Supreme Court, U.S.
FILED

No. 95-1226 JAN 31 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

FRANK J. KELLEY, Attorney General of the State of Michigan; THE OKLAHOMA CORPORATION COMMISSION; THE MONTANA PUBLIC SERVICE COMMISSION; COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; CARLA STOVALL, Attorney General of the State of Kansas; and THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO, Attorney General of the United States,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

The Coalition Against Federal Preemption of State Motor Carrier Regulation
By its counsel:
ROBERT E. MCFARLAND*
JENNIFER A. HAY
FOSTER, SWIFT, COLLINS & SMITH, P.C.
32300 Northwestern Hwy., Ste. 230
Farmington Hills, Michigan 48334
Telephone: (810) 851-7500
Fax: (810) 851-7504

*Counsel of Record

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

-and-

RICHARD C. LABARTHE
MOCK, SCHWABE, WALDO,
ELDER, REEVES & BRYANT
A Professional Corporation
Fifteenth Floor
One Leadership Square
211 North Robinson
Oklahoma City, Oklahoma
73102
Telephone: (405) 235-5500
Fax: (405) 235-2875

Attorney General of Michigan
FRANK J. KELLEY
By his counsel:
FRANK J. KELLEY
Attorney General of Michigan
THOMAS L. CASEY
Michigan Solicitor General
KELLY G. KEENAN
Assistant Deputy
Attorney General
The Law Building
Lansing, Michigan 48913
Telephone: (517) 335-1853
Fax: (517) 335-4213

The Oklahoma Corporation
Commission
By its counsel:
LAWRENCE R. EDMISON
General Counsel
LESLIE WILSON PEPPER
Deputy General Counsel
Jim Thorpe Building
2101 North Lincoln Boulevard
Oklahoma City, Oklahoma
73105
Telephone: (405) 521-2255
Fax: (405) 521-4150

Montana Public Service
Commission
By its counsel:
MARTIN JACOBSON
Special Assistant
Attorney General
State of Montana
1701 Prospect Avenue
P.O. Box 202601
Helena, Montana 59620
Telephone: (406) 444-6178
Fax: (406) 444-7618

Attorney General of Kansas
CARLA STOVALL
Kansas Corporation
Commission
By their counsel:
W. ROBERT ALDERSON
Special Assistant
Attorney General
JOHN E. JANDERA
Special Assistant
Attorney General
ALDERSON, ALDERSON &
MONTGOMERY
2101 S.W. 21st Street
Topeka, Kansas 66604
Telephone: (913) 232-0753
Fax: (913) 232-1866

The International
Brotherhood of Teamsters
By its counsel:
MARC J. FINK
TORBJORN SJOGREN
SHER & BLACKWELL
Suite 612, 2000 L Street, N.W.
Washington, D.C. 20036
Telephone: (202) 463-2500
Fax: (202) 463-4950

QUESTIONS PRESENTED FOR REVIEW

1. Does Section 601 of the Federal Aviation Administration Authorization Act of 1994 ("Section 601"), which prohibits virtually all state regulation of intrastate motor carriers, violate the Tenth Amendment of the United States Constitution, because it compels state governments not to take legislative action which they believe is in the best interest of their citizens and, at the same time, fails to offer the states any incentives for not enacting such legislation, and fails to provide a comprehensive federal scheme to occupy the field?

2. Does the sweeping federal preemption of almost all state laws governing intrastate trucking companies accomplished by Section 601 exceed Congress' authority under the Commerce Clause of the United States Constitution, in that the legislative means are not reasonably adapted to a permissible constitutional end and it results in a dual system of regulation which discriminates against states and precludes them from regulating intrastate activities in the best interest of their citizens?

3. Does the invalidation brought about by Section 601 of a state's entire legislative agenda for its motor carrier industry, including even state antitrust laws, the Uniform Commercial Code and consumer protection acts, constitute a violation of the Constitution's Guarantee Clause, as state government officials no longer remain accountable to their electorate?

PARTIES

PETITIONERS

1) Frank J. Kelley, Attorney General of the State of Michigan
2) The Oklahoma Corporation Commission
3) The Montana Public Service Commission
4) Coalition Against Federal Preemption of State Motor Carrier Regulation*
5) The International Brotherhood of Teamsters
6) Carla Stovall, Attorney General of the State of Kansas
7) The State Corporation Commission of the State of Kansas

RESPONDENTS

1) The United States of America, ex rel. the Department of Justice
2) Janet Reno, Attorney General of the United States

---

*The Coalition is an unincorporated association of carriers, shippers, individuals and trade associations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. History of Proceedings and Basis for Federal Jurisdiction 4

REASONS FOR GRANTING THE WRIT 5

A. Section 601 Violates the Tenth Amendment of the United States Constitution 7

B. Section 601 Exceeds Congress' Authority Under the Commerce Clause and is Not Reasonably Adapted to Valid Constitutional Ends 16

1. There is No Rational Basis for the Section 601 Finding that the Preempted Activity has a Substantial Effect on Interstate Commerce .. 17

2. There is No Reasonable Relationship Between the Selected Means and the Permitted End of Section 601 22

C. Section 601 Violates the Guarantee Clause 26

CONCLUSION 30

TABLE OF CONTENTS – Continued

Page

APPENDIX

A. Decision of the U.S. Court of Appeals for the Tenth Circuit of November 2, 1995 ..... App. 1

B. Decision of the U.S. District Court, Western District of Oklahoma of December 30, 1994..... App. 19

C. Tenth Amendment, U.S. Const., Am. X..... App. 46

D. Commerce Clause, U.S. Const., Art. I, Sec. 8, cl. 3..... App. 47

E. Guarantee Clause, U.S. Const., Art. IV, Sec. 4 App. 48

F. Section 601 of the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 11501(h) and 49 U.S.C. § 41713(b)(4) ..... App. 49

G. ICC Termination Act of 1995, 49 U.S.C. § 14501 ..... App. 53

H. The Names of the Additional Parties and Their Counsel Jointly Submitting this Petition .... App. 56

TABLE OF AUTHORITIES

Page

CASES

FEDERAL

Acorn v. Edgar, 56 F.3d 791 (7th Cir. 1995) 7

American Airlines v. Wolens, 513 U.S. ___, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) 23, 24

Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) 26

Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993) 8

Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts, 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) 14

Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993) 7

Cipollone v. Liggett Group, Inc., 505 U.S. ___, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) 14

Corporate Travel Consultants, Inc. v. United Airlines, Inc., 799 F. Supp. 58 (N.D. Ill. 1992) 23

Eichholz v. Public Service Commission of Missouri, 306 U.S. 288, 83 L. Ed. 2d 641, 59 S. Ct. 533 (1939) 19

Federal Express Corporation v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992) 6

FERC v. Mississippi, 456 U.S. 742, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982) 14

TABLE OF AUTHORITIES – Continued

Page

Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994) 8

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) 14, 17

Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) 14, 27

Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984) 23

Hodel v. Virginia Surface Mining and Reclamation Associates, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981) ..... *passim*

Howard v. Northwest Airlines, Inc., 793 F. Supp. 129 (S.D. Tex. 1992) 23, 24

In re Duncan, 139 U.S. 449, 11 S. Ct. 573, 35 L. Ed. 219 (1891) 27

Kelley v. U.S., 69 F.3d 1503 (10th Cir. 1995) 1, 18, 19, 20, 23

Kentucky Div., Horsemen's Benevolent Association v. Turfway Park, 20 F.3d 1406 (6th Cir. 1994) 8

Kies v. Lowrey, 199 U.S. 233, 26 S. Ct. 27, 50 L. Ed. 167 (1905) 28

Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994) 7

Lawal v. British Airways, PLC, 812 F. Supp. 713 (S.D. Tex. 1992) 23

TABLE OF AUTHORITIES – Continued

Page

Leonard Express v. United States, 298 F. Supp. 556 (W.D. Pa. 1969) 19

Luther v. Borden, 7 How. 1, 12 L. Ed. 581 (1849) 26

Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976) 14

Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994) 8

Marlow v. AMR Services Corp., 870 F. Supp. 295 (D. Haw. 1994) 24

Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017, 20 L. Ed. 2d 1020 (1968) 17, 19

McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994) 8

Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627 (1876) 27

Morales v. Trans World Airlines, 504 U.S. ___, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) 14, 22, 23, 24

New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ..... *passim*

O'Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3158, 104 L. Ed. 2d 1021 (1989) 23

Perez v. United States, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) 18

Ponca Tribe v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994), *cert. dismissed*, 63 U.S.L.W. 3477 (Nov. 8, 1995) 7

Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994) 8

TABLE OF AUTHORITIES – Continued

Page

Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) 26

Rombom v. United Air Lines, Inc., 867 F. Supp. 214 (S.D. N.Y. 1994) 24

Romero v. United States, 883 F. Supp. 1076 (W.D. La. 1994) 8

Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, 115 S. Ct. 932 (1995) 7

Service Storage & Transfer Co. v. Virginia, 359 U.S. 171, 79 S. Ct. 714, 3 L. Ed. 2d 717 (1959) 6, 19

Smith v. America West Airlines, Inc., 4 F.3d 356 (5th Cir. 1993) 23

United States v. Hampshire, 892 F. Supp. 1327 (D. Kan. 1995) 7

United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) 14, 18

United States v. Mussari, 894 F. Supp. 1360 (D. Ariz. 1995) 7

United States v. Schroeder, 894 F. Supp. 360 (D. Ariz. 1995) 7

United States v. Wrightwood Dairy Co., 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726 (1942) 18

Von Anhalt v. Delta Airlines, Inc., 735 F. Supp. 1030 (S.D. Fla. 1990) 24

Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, Sup. Ct. No. 95-673 (Jan. 22, 1996) 7

TABLE OF AUTHORITIES – Continued

Page

Wagman v. Federal Express Corp., 844 F. Supp. 247 (D. Md. 1994) 24

Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) 18

CONSTITUTIONAL PROVISIONS/STATUTES/REGULATIONS

FEDERAL

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* 27

Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707 ..... 10, 22, 23, 24

Brady Handgun Violence Prevention Act amending the Gun Control Act of 1968, 18 U.S.C. § 922 *et seq.* 7

Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 10

Child Support Recovery Act of 1992, 18 U.S.C. § 228 7

Commerce Clause, U.S. Const., Art. I, Sec. 8, cl. 3 ....*passim*

Equal Protection Clause, U.S. Const., Am. XIV, Sec. 1 27

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1604, codified, as amended, at 49 U.S.C. § 14501 ..... *passim*

Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. § 620 *et seq.* 8

Guarantee Clause, U.S. Const., Art. IV, Sec. 4 ..... *passim*

ICC Termination Act of 1995, Pub. L. No. 104-88 .....2, 3, 11, 12, 20

TABLE OF AUTHORITIES – Continued

Page

Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* 7

Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* 11

Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 *et seq.* 8

Low Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 20216, *et seq.* 8, 26

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 14

National Voter Registration Act of 1993, 42 U.S.C. § 1973 7

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1898 10

Supremacy Clause, U.S. Const., Art. VI, cl. 2 26

Tenth Amendment, U.S. Const., Am. X..... *passim*

Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1683.....11, 12

Uniform Commercial Code ..... i, 3, 16, 19, 25

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331..... 5

49 U.S.C. § 11301..... 12

49 U.S.C. § 13501(1)(B) 6

49 U.S.C. § 13706..... 12

49 U.S.C. § 13708..... 12

49 U.S.C. § 13710(a)(1)..... 12

49 U.S.C. § 14101(c) 12

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 14102 12

49 U.S.C. § 14122(b) 12

49 U.S.C. § 14123(a)(1) 2, 12

49 U.S.C. § 14501 ..... 3, 20

49 U.S.C. § 14705 12

49 U.S.C. § 14706 ..... 12, 25

49 U.S.C. § 41713(b)(4) 2, 23

INTERSTATE COMMERCE COMMISSION

Al Cordeiro d/b/a Cordeiro Trucking – Extension – Contract Carrier Service; No. MC-160678 (Sub 1) 1984 Fed. Carrier Cases, 47,475 (September 1984) 21

Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application, 131 M.C.C. 578, 1979 W.L. 11177 (ICC) (1979) 21

Transportation of "Waste" Products for Reuse, Ex Parte MC-85, 114 M.C.C. 92 (1971), 120 M.C.C. 597 (1974), and 124 M.C.C. 583 (1976) 21

OTHER

H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. (1994), *reprinted in,* 1994 U.S.C.C.A.N. 677 ..... 6, 23

H.R. Cong. Rep. No. ___, 104th Cong., 1st Sess. (1995) 21

McConnell, *Federalism: Evaluating the Founders' Design,* 54 U. Chi. L. Rev. 1484, 1491-1511 (1987) 13

TABLE OF AUTHORITIES – Continued

Page

Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum L. Rev. 1, 3-10 (1988) 13

R.W. Apple, Jr., *Washington, 1995: Echoes of a 200-Year Debate*, N.Y. Times, Dec. 24, 1995, § 4-1 8

The Federalist No. 28, (Alexander Hamilton) (Clinton Rossiter ed. 1961) *15*

The Federalist No. 32, (Alexander Hamilton) (Clinton Rossiter ed. 1961) 15

The Federalist No. 51, (James Madison) (Clinton Rossiter ed. 1961) 15

John Nowalk & Ronald Rotunda, *Constitutional Law*, § 3.1 (4th ed. 1991) 17

Symposium – Reflections on United States v. Lopez, 94 Mich. L. Rev. 533 (1995) 18

The Supreme Court – Leading Cases, 106 Harv. L. Rev. 163 (1992) 28

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners Frank J. Kelley, Attorney General of the State of Michigan; The Oklahoma Corporation Commission; The Montana Public Service Commission; Coalition Against Federal Preemption of State Motor Carrier Regulation; The International Brotherhood of Teamsters; Carla Stovall, Attorney General of the State of Kansas and The State Corporation Commission of the State of Kansas respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Appendix A, *infra*, p. 1) denying the appeal of Petitioners is reported at 69 F.3d 1503 (10th Cir. 1995). The opinion of the United States District Court for the Western District of Oklahoma (Appendix B, *infra*, p. 19), denying Petitioners' requested relief, is unreported.

JURISDICTION

Jurisdiction of this Court to review this matter by writ of certiorari is provided for by 28 U.S.C. § 1254(1). The Petitioners seek review of a final order and judgment of the United States Court of Appeals for the Tenth Circuit filed on November 2, 1995.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are three constitutional provisions involved; the Tenth Amendment, U.S. Const., Am. X (Appendix C, *infra*, p. 46), the Commerce Clause, U.S. Const., Art. I, Sec. 8, cl. 3 (Appendix D, *infra*, p. 47), and the Guarantee Clause, U.S. Const., Art. IV, Sec. 4 (Appendix E, *infra*, p. 48). The statute involved is Section 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), as initially enacted

at 49 U.S.C. § 11501(h) and 49 U.S.C. § 41713(b)(4) (Appendix F, *infra*, p. 49), and as amended by the ICC Termination Act of 1995, recodifying 49 U.S.C. § 11501(h) at 49 U.S.C. § 14501(c) (Appendix G, *infra*, p. 53).

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioners, the Oklahoma Corporation Commission, the Montana Public Service Commission, the Kansas Corporation Commission, Frank J. Kelley, Attorney General of the State of Michigan, Robert Stephan, Attorney General of the State of Kansas,[1] the Coalition Against Federal Preemption of State Motor Carrier Regulation,[2] and the International Brotherhood of Teamsters, commenced this action on December 2, 1994, challenging the constitutionality of Section 601 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Title IV, 108 Stat. 1604.[3] (hereinafter "Section 601").

Section 601, which became effective on January 1, 1995, prohibits any state or any branch or political subdivision thereof from enacting or enforcing any laws or regulations relating to any price, route, or service in intrastate commerce of: a) an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement); or b) any motor carrier.

Thus, pursuant to Section 601, states and local governments are prohibited not only from regulating the intrastate

---

[1] Carla Stovall became Attorney General of the State of Kansas in January of 1995, after this action commenced.

[2] The Coalition is an unincorporated association of carriers, individuals, shippers and truck industry trade groups organized to oppose federal preemption.

[3] The section was amended and recodified in part, at 49 U.S.C. § 14501 by the ICC Termination Act of 1995, Pub. L. No. 104-88 (December 29, 1995). It formerly appeared at 49 U.S.C. § 11501(h). *See also* 49 U.S.C. § 41713(b)(4), for the corresponding "air carrier affiliates" preemption language of Section 601.

prices, routes and services of for-hire motor carriers of property, but are also precluded from regulating in any way the prices, routes or services of such operations as brine tankers, hazardous waste haulers, construction equipment transporters, recyclable trucks, dump trucks, mobile home haulers, and tow truck operators[4] as well as private motor carriers transporting any kind of property. Affected are a myriad of state statutes that have nothing to do with motor carrier economic regulation, including laws establishing carrier liability for loss and damage claims, statutes of limitations (for damage, overcharge and undercharge claims), consumer protection, state antitrust provisions, hazardous waste transportation licensing, and even Article VII of the Uniform Commercial Code.

Prior to the enactment of Section 601, forty-one states had laws that in some fashion provided for the regulation of their respective intrastate motor carrier industries. Such regulations had been in place for sixty or more years. Many of these states regulated entry into the intrastate trucking industry as well as the rates charged by that industry. The laws were designed by the various state legislatures to further numerous purposes adjudged by them to be salutary, including universal access by businesses to truck transportation facilities, establishment of nondiscriminatory pricing and service, setting of reasonable price levels, and maintenance of adequate levels of safety through a network of financially stable carriers. Those forty-one states are not the only ones affected by Section 601, however. All fifty states are affected by the enactment of Section 601 to the extent that the broad preemption invalidates the many ancillary laws governing the industry.[5]

---

[4] So-called non-consensual tows can be regulated by the states after Section 601 was amended by the ICC Termination Act of 1995 to include this exemption. *See* 49 U.S.C. § 14501(c)(2)(c).

[5] Section 601, as initially enacted, made the effective date of the preemption January 1, 1995, for all states save Hawaii, where the Act was to take effect on August 22, 1997. *See* Section 601(d). As amended by the ICC Termination Act of 1995, however, Hawaii has now been excluded totally from the federal preemption.

The only matters excepted from Section 601's sweeping preemption are the safety regulatory authority of a state, the transportation of household goods, and the following four so-called "state standard transportation practices" of motor carriers: i) uniform cargo liability rules, ii) uniform bills of lading, iii) uniform cargo credit rules, and iv) antitrust immunity for joint line rates. These four state standard transportation practices can only be regulated, however, *if the carrier chooses to be so regulated*, and only so long as the state regulation is no more burdensome than federal regulation on these same subjects.

B. History of Proceedings and Basis for Federal Jurisdiction.

In this action filed December 2, 1994, the Petitioners challenge the constitutionality of Section 601 on three grounds. First, Section 601 unconstitutionally infringes on state sovereignty in violation of the Tenth Amendment of the U.S. Constitution. Congress has compelled the states to cease enforcement of intrastate motor carrier laws that they have enacted in the best interests of their citizens, even while Congress continues to regulate interstate motor carriers in ways that the state cannot. Second, in enacting Section 601, Congress exceeded its authority under the Commerce Clause, Article I, Section 8, Clause 3 of the U.S. Constitution. The scope and breadth of Section 601 preempts state laws and regulations completely unrelated to interstate commerce, and unrelated to economic regulation of the trucking industry. Third, Section 601 violates the Guarantee Clause, Article IV, Section 4 of the U.S. Constitution, by denying the states a republican form of government.

With the agreement of all parties, a trial on the merits was consolidated with the Petitioners' Motion for Preliminary Injunction. Argument was heard on December 27, 1994, in the United States District Court for the Western District of Oklahoma before Chief Judge Russell. On December 30, 1994, the district court issued its Order and Judgment denying the Petitioners' requested relief. The district court rejected

Respondents' jurisdictional arguments on standing and sovereign immunity grounds but, on the merits, found that Section 601 was constitutional.

Petitioner Frank J. Kelley, Attorney General of the State of Michigan, filed a Notice of Appeal in the United States Court of Appeals for the Tenth Circuit on January 2, 1995 and was assigned Case No. 95-6000. The remaining Petitioners filed their Notice of Appeal on January 10, 1995 and were assigned Case No. 95-6033. These cases were combined for appeal. Petitioner Frank J. Kelley also filed a Motion and Brief for an Emergency Injunction of Section 601 of the FAAAA in the Tenth Circuit Court of Appeals on January 5, 1995. The remaining Petitioners joined in the Application for an Emergency Injunction on January 9, 1995. The court of appeals denied Petitioners' request for injunctive relief on February 16, 1995, and on November 2, 1995, it issued a decision which affirmed the district court's ruling.

The basis for federal jurisdiction over this action is 28 U.S.C. § 1331. Petitioners now seek a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

The preemption brought about by Section 601 is unlike any other congressional attempt to replace state regulation of *intrastate* commerce. This legislation has created a unique tension and disparity between state and federal authority that this Court has never directly addressed.

This is another one of those "most difficult . . . cases 'of great importance and delicacy' in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the states," as in *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992). The decision of the Tenth Circuit below 1) directly conflicts with the holding of this Court in *New York, supra,* and *Hodel v. Virginia Surface Mining and Reclamation Associates*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981); and 2) presents such important

questions concerning the interpretation of the Tenth Amendment, Commerce Clause and Guarantee Clause, as well as the federal government's authority vis-a-vis the states, that the petition for a writ of certiorari should be granted.

This is not the garden variety Commerce Clause case in which Congress preempts all state regulation by fully occupying a field. Various activities of interstate motor carriers (including activities which pertain to transportation between two points in a single state)[6] continue to be subject to regulation by the federal government. However, states are precluded from engaging in the same type of regulation over intrastate motor carriers and those intrastate carriers also are left unregulated by the federal government. As a result, there is both a regulatory vacuum and an inexplicable disparity between the federally regulated interstate carriers and the totally unregulated intrastate carriers.[7]

Also, this case presents important issues under the Tenth Amendment and the Guarantee Clause. Without question, the scope of federal preemption under Section 601 is extremely broad. State and local governments are precluded from taking

---

[6] The ICC formerly had jurisdiction over motor carrier operations between a place in a state and another place in the same state, *if the transportation was conducted through another state* – e.g., a shipment from Kansas City, Kansas, to Topeka, Kansas, transported through Kansas City, Missouri, or a shipment from Detroit, Michigan to Grand Rapids, Michigan transported through Toledo, Ohio. *See* former 49 U.S.C. § 10521(1)(B), and *Service Storage & Transport Co. v. Virginia*, 359 U.S. 171; 79 S. Ct. 714; 3 L. Ed. 2d 36 (1959). That jurisdiction has been transferred to the United States Department of Transportation and the Surface Transportation Board by the ICC Termination Act of 1995. *See* 49 U.S.C. § 13501(1)(B). *This is the only situation*, however, where the federal agencies now regulate motor transportation between points in the same state.

[7] Neither is this a commonplace Commerce Clause case where Congress acts to level the playing field and create uniformity. Section 601 is such a sweeping provision that it goes well beyond Congress' intention to level the regulatory playing field for small package delivery carriers. The Conference Committee made plain that this was Congress' initial focus. *See* H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess., at 87 (1994), *reprinted in*, 1994 U.S.C.C.A.N. at 1759. *See also Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991) *cert. denied*, 112 S. Ct. 2956 (1992), for the genesis of the problem.

legislative or administrative action in a broad range of areas in which they have traditionally acted. These state and local actions were deemed to be in the best interest of their citizens. Now, pursuant to Section 601, there will be no governmental action or oversight, either by the state government or the federal government. Such a federal mandate, Petitioners submit, exceeds the authority of Congress. Section 601's mandate that a state not take action in an area which is not then occupied by the federal government violates the Tenth Amendment and the Guarantee Clause of the Constitution.

A. Section 601 Violates the Tenth Amendment of the United States Constitution.

The Tenth Amendment to the Constitution states that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The leading case today interpreting the Tenth Amendment is *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).[8]

---

[8] The importance of the *New York* principles is evidenced by the number of cases and variety of contexts in which Tenth Amendment rulings have been handed down by the federal courts since 1992. Federal statutes challenged include the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, [*Ponca Tribe v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), *cert. dismissed*, 63 U.S.L.W. 3477 (Nov. 8, 1995); *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, 115 S. Ct. 932 (1995) (although the court of appeals in *Seminole* refused to rule on Defendants' Tenth Amendment claim, as it was raised for the first time on appeal, 11 F.3d at 1019, fn.2, the Tenth Amendment ramifications were addressed in oral argument), 64 U.S.L.W. 3307 (Oct. 31, 1995); and *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993)]; the National Voter Registration Act of 1993, 42 U.S.C. § 1973 *et seq.*, [*Acorn v. Edgar*, 56 F.3d 791 (7th Cir. 1995), and *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, Sup. Ct. No. 95-673 (Jan. 22, 1996)]; the Child Support Recovery Act of 1992, 18 U.S.C. § 228 [*United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995); *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995); and *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995)], the Brady Handgun Violence Prevention Act amending the Gun Control Act of 1968, 18 U.S.C. § 922 *et seq.* [*Koog v. United*

The Court in *New York* addressed the constitutionality of the Low Level Radioactive Waste Policy Amendments Act of 1985. In holding this law unconstitutional, the Court therein noted that while Congress can seek to utilize the states as instruments of regulation, it cannot commandeer the states to enact or enforce federal programs, nor can Congress force the states to promulgate laws and regulations. The Court held that:

> While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. *Id.* at 2421.

The Court further pointed out that:

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, **it lacks the power directly to compel the States to require or prohibit those acts**. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce

---

States, 852 F. Supp. 1376 (W.D. Tex. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); and *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1994)]; the Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 *et seq.* [*Kentucky Div., Horsemen's Benevolent Association v. Turfway Park*, 20 F.3d 1406 (6th Cir. 1994)]; and the Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. § 620 *et seq.*, [*Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993)]. The Tenth Amendment's prominence has been noticed in the press as well. *See* R.W. Apple, Jr., *Washington, 1995: Echoes of a 200-Year Debate*, N.Y. Times, Dec. 24, 1995, § 4-1.

> directly; **it does not authorize Congress to regulate state governments' regulation of interstate commerce**. *Id.* at 2423 (Citations omitted) (Emphasis added).

Neither is Congress authorized to regulate state governments' regulation of intrastate commerce.

According to *New York*, Congress can "encourage" states to act in a particular way, through such devices as incentives. It is permissible for Congress to attach conditions to the receipt of federal funds, for example. Also, Congress can provide the states with a choice to regulate activity according to federal standards or to have state law preempted by a federal regulatory scheme. *Id.* at 2423-2424. In both of these situations, however, the Court in *New York* made plain that it was the residents of the states who retained the ultimate power to determine whether the state would comply. In such a manner, state governmental officials remain accountable to their electorate. This would not be true, according to *New York*, if the federal government compelled the states to regulate. *Id.* at 2424.

Finally, Congress may, consistent with its authority under the Commerce Clause, preempt state regulation. However, in these circumstances, the Court explained that:

> Where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state laws preempted by federal regulation. *Id.* at 2429 (citing *Hodel*, 452 U.S. at 228).

Here, Congress preempted state regulation of intrastate motor carriers, but it did not replace such regulation with federal standards. To the contrary, no federal standards of any kind are applied to intrastate carriers, although they are applied to interstate motor carriers. Similarly, states were not offered the choice to regulate their intrastate carriers in a manner consistent with federal standards.

Thus, unlike other schemes of preemption, Congress did not provide in Section 601 that another federal agency, e.g.,

the former Interstate Commerce Commission or the Federal Aviation Administration, would oversee the intrastate motor transportation of property. Instead, Congress simply declared that:

> A state . . . may not enact or enforce a law, regulation, or other provision, having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier with respect to transportation of property. Section 601(c) of Pub. L. No. 103-305.[9]

No system of federal regulation replaced this state regulatory vacuum under Section 501's terms. This contrasts sharply with the method of preemption chosen by Congress in the airline, rail, and motor carrier of passenger fields, where Congress either allowed the states to continue regulating, consistent with federal standards, or provided that a federal regulatory framework, administered by a federal administrative agency, would prevail. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1898; Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102; Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-405, 92 Stat. 1707.

These other transportation deregulatory acts were carefully crafted to provide a uniform national regulatory scheme. They did not create a void. For example, the Staggers Rail Act and the Bus Regulatory Reform Act both left the states with regulatory responsibility and authority. The ADA provided for continued regulation by the Federal Aviation Agency, which currently regulates *all* airline transportation. Under the ADA, all intrastate air carrier transportation was deemed to be interstate transportation. Therefore, all air carrier transportation is now properly regulated uniformly at the federal level. This is vastly different from the two-tiered system Congress has created in Section 601 where intrastate motor carrier transportation is completely unregulated and unregulatable, while interstate motor carrier transportation

---

[9] An identical prohibition in Section 601 also applies to air carriers or carriers affiliated with direct air carriers. Section 601(b) of 103 Pub. L. No. 305.

continues to be regulated in numerous important respects by the Surface Transportation Board and Department of Transportation.

In Section 601, Congress did not give the states a choice between regulating in a fashion consistent with the federal regulation of motor carriers, as set forth in the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, as amended,[10] or having their state regulation preempted by a federal regulatory scheme. No governmental entity at the state or federal level is regulating intrastate carriers.

The states simply have been told that they cannot act. The states have not been given incentives, in order to bring their method of regulation into conformity with federal regulation. Nor has Congress fully occupied the field of regulation, as the Tenth Circuit erroneously concluded, by replacing state regulation of intrastate carriers with some system of federal regulation. Rather, the states' ability to legislate for themselves has been destroyed. State law has been prohibited even though Congress has admitted a need for motor carrier regulation by continuing to regulate carriers on a federal level. This is precisely why Section 601 violates the Tenth Amendment. Congress is not regulating an aspect of intrastate commerce because of its purported effect on interstate commerce. In fact, Congress is not regulating intrastate commerce at all; *it is regulating the states as states.*

Congress' recognition of the importance of regulating motor carriers was evidenced by the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), Pub. L. No. 103-311, 108 Stat. 1683, which continued various entry and rate controls over interstate motor carriers. This legislation was enacted just three days after the Section 601 provision was signed into law that commanded the states not to regulate in a

---

[10] This body of law has now been replaced by the provisions of the ICC Termination Act of 1995. That Act transfers motor carrier regulatory responsibility to the United States Department of Transportation, and, within that Department, the Surface Transportation Board.

like (or any) fashion. Pursuant to TIRRA, the Interstate Commerce Act continued a plethora of regulatory requirements on a variety of subjects.[11]

Congress' latest rewrite of interstate truck regulation, embodied in the ICC Termination Act of 1995, still reflects a continuing judgment that regulation of certain aspects of interstate truck transportation remains vital.[12] Pursuant to Section 601, however, a state cannot impose these same requirements upon intrastate motor carrier transportation, even though it believes, as Congress did in interstate transportation, that such requirements are in the best interest of its citizens.

Neither will the Department of Transportation nor the newly created Surface Transportation Board regulate the intrastate activities of motor carriers in any of these same respects. A regulatory black hole has been created at the state level. Congress has not fully occupied a field with regulation.

---

[11] These now-repealed provisions included rates (former 49 U.S.C. §§ 10701(a), 10761(a) and 10761(a)(3)); contract requirements (former 49 U.S.C. § 10702(c)); freight bill information (former 49 U.S.C. § 10767(b)); nondiscriminatory services (former 49 U.S.C. § 10741); and loss and damage standards (former 49 U.S.C. § 11707), among others.

[12] These include federal regulation of *interstate commerce* by a newly created Surface Transportation Board within the United States Department of Transportation, consistent with a well defined congressionally-expressed transportation policy designed to provide for competition and reasonable rates. 49 U.S.C. § 11301. Carriers are required to provide adequate service on reasonable request. 49 U.S.C. § 14101(c). The terms under which receivers are liable for payment of rates is established. 49 U.S.C. § 13706. A "truth in billing" standard is mandated. Actual rates must be disclosed on billing documents. 49 U.S.C. § 13708. Carriers must provide shippers with copies of rate schedules upon request. 49 U.S.C. § 13710(a)(1). Jurisdiction is conferred on the Secretary of Transportation to establish conditions for truck operations in leased equipment. 49 U.S.C. § 14102. The Secretary shall require certain classes of motor carriers to file annual safety and financial reports. 49 U.S.C. § 14123(a)(1). The Secretary or Board may inspect records and property of carriers on demand. 49 U.S.C. § 14122(b). A statute of limitations period is established for undercharge claims by carriers, and overcharge claims by shippers. 49 U.S.C. § 14705. Carriers are made fully liable for loss or damage except as to the extent there is a written agreement between a carrier and a shipper as to rates based on a limited reasonable value of the goods being transported or written declaration of the shipper. 49 U.S.C. § 14706.

It has carefully tended the interstate field, while letting the neighboring intrastate field lie fallow.

The two-tiered system Congress has created by the enactment of Section 601 has direct implications regarding the accountability of Congress and State Legislatures to their constituents. The Supreme Court has recognized that Congressional compulsion of state governments diminishes accountability and denies local constituents their opportunity to participate fully in government. *See New York*, 112 S. Ct. at 2424. Accountability is recognized as an important aspect of our federalist system because it ensures that state and federal officials regulate in accordance with the views of the electorate. When the federal government compels the state to act in accordance with a federal scheme, accountability is destroyed because, if the policy turns out to be unpopular, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* For this reason, Congress is required to regulate directly, not through the states.[13]

Through Section 601, Congress has found a new way to hide behind the states and avoid accountability. The two-tiered system of regulation that now exists, where interstate carriers are regulated and intrastate carriers are completely unregulated, creates the false impression that state governments are unresponsive to their electorate's needs, while the federal government, which continues to regulate, is addressing these needs. For example, a citizen who has a valid loss and damage claim against an intrastate carrier will quickly learn that his claim is unenforceable because the state has been required to make its laws in this area optional and the carrier involved has chosen not to be governed by it. The citizen will also discover that had the carrier been an interstate carrier rather than an intrastate carrier, there would have

---

[13] *See* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987) and Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988).

been a remedy available. This citizen is not going to recognize that it is Congress' fault that he does not have a state remedy; rather, he will believe that the state is not protecting his interests on a state level, while Congress is protecting his interests on an interstate level. Congress will not be held accountable for the fact that the states are prohibited from regulating. The two-tiered system creates a smoke screen for the federal government to hide behind.[14]

This Court has repeatedly underscored the advantages inherent in the dual federal-state sovereignty system embodied in the Constitution. *See Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410, 421-423 (1991); *New York*, *supra*, 112 S. Ct. at 2418; *FERC v. Mississippi*, 456 U.S. 742, 102 S. Ct. 2126, 72 L. Ed. 2d 532, 567 (1982) (O'Connor, J., dissenting in part); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016, 1046-1047 (1985) (Powell, J., dissenting); *United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1638-1639, 131 L. Ed. 2d 626 (1995) (Kennedy, J.,

---

[14] It is apparent that the lower courts did not appreciate the exceptional fashion in which Congress has chosen to preempt state regulation of intrastate motor carrier transportation and why the method chosen by Congress is particularly offensive to state sovereignty. The court of appeals actually cited no cases in support of its field preemption conclusion at 69 F.3d 1510. The district court's reliance on *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993), and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976) is misplaced. When Congress chose to preempt state legislation in the labor relations area through its enactment of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, as amended, it actually filled the field to provide a uniform system of regulation. The unified federal scheme applies on the state level just as it applies on the federal level. In enacting the NLRA, Congress did not prohibit the states from regulating and then refuse to regulate itself, as it has tried to do in Section 601. Likewise, the district court's citation of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), and *Morales v. Trans World Airlines*, 504 U.S. ___, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) evidences confusion regarding the type of preemption provided for in Section 601. These cases did not involve constitutional challenges to federal preemption. They are merely cases interpreting the scope of federal preemption under preemptive legislation that provided for a uniformly applicable federal regulatory scheme.

concurring). Alexander Hamilton explained his understanding of that dual sovereignty as follows:

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. *The Federalist No. 32*, at 198 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

The double security[15] to rights of the people arising from the concept of dual sovereignty obtains only if the federal government's powers are limited in respect to the states. The intrusions on the dual sovereignty concept by congressional actions such as Section 601 dilute and ultimately destroy this vital constitutional protection.

Prior to the enactment of Section 601, forty-one states regulated motor carriers from an economic standpoint. Forty-one states had determined that some degree of entry and rate control was in the best interest of their citizenry, from a safety and economic standpoint. Even the remaining states

---

[15] *The Federalist No. 28*, at 180-181 (Alexander Hamilton) (Clinton Rossiter ed. 1961) and *The Federalist No. 51*, at 323 (James Madison) (Clinton Rossiter ed. 1961).

that did not economically regulate now find the application of various of their general state laws affecting business (i.e., antitrust, consumer protection, Uniform Commercial Code) to be nullified.[16] This regulation protected consumers in areas ranging from fair and equal pricing to liability for freight loss and damage claims. The ability of the states to be accountable to their citizens in this regard has been blocked by the federal government. No longer can states, which had fine-tuned their truck regulatory systems and general business laws to meet their respective, particular needs, act on behalf of and in response to the wishes of their citizens.

The federal preemption of intrastate motor carrier regulation provided for in Section 601 is tantamount to compulsion. The states are left with no choice. *They shall not regulate.* They have no freedom left. Congress left the states with no latitude to regulate intrastate trucking with respect to anything which *relates* in any way to price, route, or service. The states are not even free to regulate such subjects in a manner consistent with otherwise existing regulation at the federal level.

B. Section 601 Exceeds Congress' Authority Under the Commerce Clause and is Not Reasonably Adapted to Valid Constitutional Ends.

While Congress' power under the Commerce Clause is plenary, it is not unlimited. For Section 601 to pass muster under the Commerce Clause, it must meet the two-part test of *Hodel, supra. Hodel* requires 1) a rational basis for Congress' finding that the activity to be regulated has a substantial effect on interstate commerce; and 2) that the means by which Congress has chosen to regulate be reasonably adapted to a constitutional end. If the lower courts had *carefully* applied this test and engaged in an independent examination of the scope and effect of Section 601, the legislation would have been found beyond the reach of the Commerce Clause and thus unconstitutional. The action of the lower courts in this

---

[16] This is true for all states except Hawaii. See footnote 5, *supra.*

case, however, is reflective of what has been termed an "abdicat[ion of their] constitutional responsibility to oversee the federal government's compliance with its duty to respect the legitimate interests of the state." *Garcia v. San Antonio Metropolitan Transit Authority, supra*, 83 L. Ed. 2d at 1053 (1985) (O'Connor, J., dissenting). Instead of engaging in an independent examination of the breadth and scope of Section 601, they blindly accepted the government's unsupported representation of its effects.

As demonstrated below, the scope of Section 601 fails both the first and second parts of *Hodel*. Under the first part, Section 601 encompasses activities outside the realm of interstate commerce that Congress may regulate. In many instances, Section 601 preempts purely intrastate activity which has no substantial impact on interstate commerce. Moreover, under the second part of the test, the overbreadth of this legislation makes it impossible to find that the legislative means are *reasonably adapted* to a permissible constitutional end.

1. There is No Rational Basis for the Section 601 Finding that the Preempted Activity has a Substantial Effect on Interstate Commerce.

The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution provides: "The Congress shall have Power to . . . regulate commerce . . . among the several States." When Congress claims to be acting pursuant to the Commerce Clause, its actions must truly be effectuating the power granted thereunder. Otherwise, Congress will have exceeded its authority and acted unconstitutionally. *See* John Nowalk & Ronald Rotunda, *Constitutional Law*, § 3.1 at 115 (4th ed. 1991).

The power of Congress under the Commerce Clause has particular limits, also, where intrastate activities are concerned. *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968). Congress cannot usurp the authority of states to regulate purely

local and intrastate forms of transportation. Local and intrastate activity may be regulated by Congress under the Commerce Clause only "if it exerts a *substantial* economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (emphasis supplied). More recently, the Supreme Court noted:

> The commerce power . . . "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Perez v. United States*, 402 U.S. 146, 151 (1971) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

If Congress has exceeded its power under the Commerce Clause, the preemption of state regulation by Section 601 cannot be upheld.

The court of appeals relied substantially upon the Court's decision in *Lopez, supra*, in finding that Congress acted within its Commerce Clause authority in enacting Section 601.[17] The Tenth Circuit held that pursuant to *Lopez*, state regulation of intrastate motor carrier activities was an area that Congress could regulate because this state regulation substantially affects interstate commerce. *Kelley v. U.S.*, 69 F.3d 1503, 1507 (10th Cir. 1995). The court quoted the Congressional findings, set forth at Section 601(a), which assert that state regulation in this area burdens interstate commerce, along with a portion of the accompanying Conference Report. *Id.* 1507-1508. Despite the Petitioners' urging, the Tenth Circuit refused to look beyond these mostly boilerplate Congressional declarations.

Even where Congress has made findings that the regulated activity substantially affects interstate commerce, courts must independently examine the statute at issue to determine

---

[17] For a discussion on the meaning and effect of *Lopez*, see *Symposium – Reflections on United States v. Lopez*, 94 Mich. L. Rev. 533 (1995).

whether there is a rational basis to conclude that interstate commerce is indeed involved. *See Maryland v. Wirtz*, *supra*, 392 U.S. at 198; *Hodel*, *supra*, 452 U.S. at 311 (Rehnquist, J., concurring) ("Moreover, simply because Congress may conclude that a particular activity substantially affects interstate commerce *does not necessarily make it so*.") (emphasis supplied). For the rational basis test to be meaningful, the courts must conduct such an independent examination. To merely rubber stamp Congressional action weakens the concept of federalism embodied in the Constitution.

The Congressional findings that accompany Section 601 are shortsighted, oversimplified and do not deal with the diverse forms of transportation service within its scope. More specifically, the findings do not in any way reflect a rationale as to why preemption is needed to extend to every conceivable form of state and local motor carrier regulation that could exist, nor do they indicate how state consumer protection laws, antitrust laws, and Uniform Commercial Codes affect interstate commerce. In this regard, Section 601 preempts a myriad of intrastate activities, properly regulated by the states, which have no impact upon interstate commerce, substantial or otherwise.[18] Indeed, the Tenth Circuit's opinion in *Kelley*, *supra*, at 1508, recognized that there are aspects of

---

[18] The regulation of intrastate truck transportation has always been regarded as a matter of state concern. See, for example, those cases which interpreted whether an ICC certificate was being utilized as a subterfuge to avoid intrastate regulation, such as *Eichholz v. Public Service Commission of Missouri*, 306 U.S. 288, 83 L. Ed. 2d 641, 59 S. Ct. 533 (1939); *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 79 S. Ct. 714, 3 L. Ed. 2d 717 (1959); and *Leonard Express v. United States*, 298 F. Supp. 556 (W.D. Pa. 1969). Prior to 1980, forty-eight states had in place some form of economic regulation for their motor carrier industry. Seven states, between January 1, 1980 and January 1, 1995, elected to deregulate economically, through the exercise of *state sovereignty*. All fifty states had in effect, through the exercise of *state sovereignty*, laws imposing obligations on their motor carriers as businesses (i.e., loss and damage liability, consumer protection, antitrust, Uniform Commercial Code), at the time that Section 601 became effective.

intrastate truck transportation which have no effect on interstate commerce, but *failed to apply that rationale to this case*:

> Granted, there are *undoubtedly* various state regulations that affect and pertain *only to purely intrastate motor carrier activities*, and have *little or no effect on interstate commerce*. (Emphasis supplied). *Id.* at 1508.

The following examples illustrate why the regulation of this industry has always been left to the states as well as the extent to which Congress has impermissibly interfered with *purely* intrastate regulation.

The regulation of tow trucks is unquestionably a matter of purely intrastate commerce. Some states, such as Michigan, Kansas and Oklahoma, had regulated tow trucks within the context of their motor carrier regulatory laws, while others regulated such operations through local ordinances or resolutions. Regardless of the method of regulation, it was all preempted by Section 601 as initially passed. When a tow truck picks up a stranded automobile outside of a city and tows it ten miles to the closest service station, this activity has nothing remotely to do with interstate commerce. Likewise, when the state requires that tow truck operators be licensed for safety and consumer protection reasons, there is no effect on interstate commerce. The court of appeals explicitly recognized Congress' overreaching in this case when it acknowledged that "601 may have some unintended effects, such as freeing the reins on intrastate towing and wrecking services. . . . " *Kelley, supra*, at 1509. Congress' late attempt to correct such an error, in the ICC Termination Act of 1995, by expanding the exemption at 49 U.S.C. § 14501 to allow state or local regulation of non-consensual tows failed to cure this situation.[19] It merely underscores the problem.

---

[19] Congress has allowed states or localities, through the newly revised preemption language in 49 U.S.C. § 14501, to regulate only "non-consent" tows. As stated in the Conference Report, in explaining this term,

> Non-consent tows occur when vehicle owners/operators are unable to give their voluntary consent to the tow. Non-consent tows typically

Regulatory oversight of the collection and disposal of solid waste and recyclables is another area of sole intrastate concern barred by Section 601. While the legislative history of Section 601 indicates that the intention of the House and Senate conferees was not to preempt state regulation of garbage and refuse collection, the statute as enacted made no such exception.[20] Indeed, the Department of Transportation has stated that regulation of recyclables was preempted. The states have a direct public health and safety interest in closely regulating this industry to ensure that their streets and communities are safe. The transportation of solid waste typically involves movement of only a few miles from point of pickup to destination. Local garbage collection is a purely intrastate activity. Also, the regulation of saltwater carriers by states such as Oklahoma and Kansas in the transportation of brine from the oil fields to disposal sites is another purely intrastate activity of a local nature.

> occur in emergency situations and when tows are made from private property. The tow truck provision in this section is designed to allow states and local governments to regulate the price of tows in non-consent cases. H.R. Cong. Rep. No. ___, 104th Cong., 1st Sess. (1995).

This does not even come close to addressing the full extent of the regulatory void in this area. If a stranded motorist arranges himself or herself for the towing service, the regulations no longer apply, despite the consumer's total inability to comparison shop while broken down or stuck in a snow drift.

[20] Even under the decisions of the then-existing Interstate Commerce Commission, which are not determinative of the issue under state law, it appears that refuse, trash and other waste materials are considered "property" and therefore would be covered by the terms of Section 601. *See, Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application*, 131 M.C.C. 578, 1979 W.L. 11177 (ICC) (1979). ("Property connotes ownership as well as value. Something that is owned can be property notwithstanding its lack of economic value."); *accord Al Cordeiro d/b/a Cordeiro Trucking – Extension – Contract Carrier Service*; No. MC-160678 (Sub 1) 1984 Fed. Carrier Cases, 47,475 (September 1984). Recyclables had repeatedly been recognized by the ICC to be subject to full economic regulation. *See Transportation of "Waste" Products for Reuse*, Ex Parte MC-85, 114 M.C.C. 92 (1971), 120 M.C.C. 597 (1974), and 124 M.C.C. 583 (1976).

Similarly, a sand and gravel operation moving loads from a sand pit to a building site fifteen miles away in the same state, does not substantially affect interstate commerce. Neither does a concrete mixer truck or an asphalt rig substantially affect interstate commerce. States have a direct interest in controlling the prices charged by such carriers and insuring that a minimal return exists for their service, as this contributes positively to the safety of the public travelling on the roads of a state.

As these examples illustrate, the extent and diversity of intrastate truck transportation is significant, and there is no rational basis for concluding that state regulation of purely intrastate motor carrier activity affects interstate commerce. Such extensive preemption might be defensible in the area of air transportation, since there are relatively few air carriers operating solely in intrastate service. That is not, however, the situation with motor transportation, where there are thousands of motor carriers providing myriad forms of strictly intrastate transportation services to local communities.[21]

2. There is No Reasonable Relationship Between the Selected Means and the Permitted End of Section 601.

Even if there were ample justification for concluding that the Congressional findings were rational and that purely intrastate transportation substantially affects interstate commerce, that is not the end of the inquiry. Under the second part of the

---

[21] It is important to note that the Airline Deregulation Act ("ADA") involved a different type of preemption scheme in a vastly different industry, with far different implications on intrastate commerce. A federal agency, the Federal Aviation Administration (successor to the Civil Aeronautics Board), was charged with a regulatory role concerning intrastate transportation in the airline industry, a factor not present with Section 601. Only three states (California, Florida, and Texas) regulated intrastate airline transportation when the ADA was enacted, as opposed to the forty-one states that regulated intrastate motor carrier transportation at the time Section 601 was enacted. Furthermore, the intrastate trucking industry has a far more significant impact on state economies than was true of intrastate airline transportation. Finally it is important to note that this Court in *Morales v. Trans World Airlines*, 504 U.S. ___, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) did not address the constitutionality of the ADA, as the district court below implied in footnote 8 at page 21 of its decision (Appendix B, p. 40).

Hodel test, Congressional action must also have a reasonable connection between the regulatory means selected and an end permitted by the Constitution. *Hodel*, *supra* at 276. As Congress purports to be regulating pursuant to the Commerce Clause, the means chosen must result in valid regulation of interstate commerce. That cannot be shown here. The blunderbuss impact of Section 601 clearly is too excessive for it to be deemed reasonably adapted to Congress' authority under the Commerce Clause.

The Tenth Circuit refused to apply the precedent of this Court as to the effect of the preemptive language, relying instead on unsupported assertions by the Department of Justice and the U.S. Department of Transportation that Petitioners had somehow exaggerated the scope of the preemption. *Kelley*, *supra*, at 1508-1509. However, since the language used in Section 601 is the same as the language used to preempt state action in the ADA, the scope and nature of the preemption has already been determined in *Morales v. Trans World Airlines*, 504 U.S. ___, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992), and *American Airlines v. Wolens*, 513 U.S. ___, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995).

The ADA, recently recodified at 49 U.S.C. § 41713, allows for continued federal regulation of the airline industry while prohibiting the states from enacting or enforcing laws "relating to rates, routes, or services." As noted in the Conference Report on Section 601, the use of the similar language was intentional. Congress "did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines*. . . . " H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess., at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 677 at 1755.[22] The Conference Report further stated that "the central purpose of this

[22] The lower courts have also interpreted the preemptive language of the Airline Deregulation Act broadly. *See, e.g., O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3158, 104 L. Ed. 2d 1021 (1989); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984); *Smith v. America West Airlines, Inc.*, 4 F.3d 356 (5th Cir. 1993); *Lawal v. British Airways, PLC*, 812 F. Supp. 713 (S.D. Tex. 1992); *Corporate Travel Consultants, Inc. v. United Airlines, Inc.*, 799 F. Supp. 58 (N.D. Ill. 1992); *Howard*

legislation is to extend to all affected carriers . . . *the identical intrastate preemption* of prices, routes, and services as that originally contained in Section 105(a), 49 U.S.C. App. 1305(a)(1) of the Federal Aviation Act." *Id.* at 83. (Emphasis supplied).

The ADA cases make clear that the price, route, and service language of the motor carrier preemption occasioned by Section 601 will have exceedingly broad application to a wide variety of factual situations. *Wolens* refers specifically to state-imposed obligations. 115 L. Ed. 2d at 725-726. *Morales* involved state laws on deceptive advertising and trade practices. *Wolens* had as its subject, in part, a state consumer fraud and deceptive business practice statute. This Court concluded that both such consumer protection statutes were preempted by the ADA. There is no question as to how the courts will interpret Section 601. Therefore, Section 601 not only preempts state economic regulation of intrastate trucking as contained in state motor carrier economic regulatory acts, but it also preempts state antitrust laws, state consumer protection laws, state laws regarding cargo loss and damage claims, state laws governing the transportation of solid and hazardous waste, and state uniform commercial codes. All of these state laws relate to a carrier's "price, route or service." They are all "state-imposed obligations." Even state laws regarding safety of motor carrier operations, as opposed to safety of motor vehicles, are in jeopardy as a result of Section 601.[23]

---

v. Northwest Airlines, Inc., 793 F. Supp. 129 (S.D. Tex. 1992); *Von Anhalt v. Delta Airlines, Inc.* 735 F. Supp. 1030 (S.D. Fla. 1990); *Marlow v. AMR Services Corp.*, 870 F. Supp 295 (D. Haw. 1994); *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214 (S.D. N.Y. 1994); and *Wagman v. Federal Express Corp.*, 844 F. Supp. 247 (D. Md. 1994).

[23] Respondents argued that Section 601, by its very terms, preserves state regulation over motor carrier safety. This argument ignores the perplexing manner in which Congress threw a safety "bone" to the states in Section 601. The states were not given safety regulatory authority over *motor carriers* or *motor carrier operations*; they were only given safety authority over *MOTOR VEHICLES*, at Section 601(b) and (c). *Motor carrier* authority is limited to insurance requirements alone. Thus, a state retains the ability to oversee the safety of the motor vehicle, but

The fact that portions of a state's Uniform Commercial Code will be preempted by Section 601 underscores the irrational nature of the legislation.[24] The numerous state laws that have been preempted are evidence that Congress has not legislated according to means reasonably connected to a permissible constitutional end.

Another, perhaps ironic, illustration of the overbroad method employed by Congress to preempt state economic regulation of intrastate commerce is the fact that, rather than create uniformity, Congress has created a disjointed two-tiered system of regulation. One of the reasons Congress has been given the authority to regulate *interstate* commerce is the perceived need to have uniformity in commerce on an interstate level, for the good of the nation as a whole. Thus, when Congress extends its reach into the realm of intrastate commerce, it must be on the basis that differing state regulation of intrastate commerce is burdening interstate commerce and thwarting Congress' ability to maintain uniformity. However, Congress has not created uniformity in this situation. It has created just the opposite. For example, the obligation of an *interstate* carrier for damaged shipments is imposed by law at 49 U.S.C. § 14706, *not, as provided by Section 601, at the election of the carrier.* Congress should not be able to claim a need for uniformity as a basis for regulating intrastate commerce and then create in reality a serious lack of uniformity.

The legislative means chosen by Congress through Section 601 preempts all state and local regulation of intrastate motor transportation services without replacing it with any

---

not the motor carrier operations in general. Hours of service, driver qualifications, and drug testing provisions are all put at risk by the callous intrusiveness of the federal preemption.

[24] It must be remembered that the ability of a state to regulate any one of the four state standard transportation practices, such as bills of lading or carrier liability for loss and damage, is directly dependent upon whether a carrier elects to be so regulated. Thus, a carrier can choose whether it wishes to be covered by certain of the U.C.C. Article VII provisions, for example, or laws imposing liability as to full value for lost or damaged shipments. One can only speculate as to the number of carriers that will choose to be so regulated, when their competitors are not.

regulatory scheme whatsoever. In effect, Congress is pre-empting state law in favor of nothing. Stated another way, it is invoking its power under the Supremacy Clause of the Constitution, but there is no federal supreme law which it is seeking to impose.

C. Section 601 Violates the Guarantee Clause.

The Guarantee Clause of the Constitution states simply that, "The United States shall guarantee to every State in this Union a Republican Form of Government. . . . " Art. IV, section 4, U.S. Constitution. The situation presented by this case offers the Court a unique opportunity to enforce this seldom-invoked Constitutional provision.

This Court has already evidenced a willingness to discuss the Guarantee Clause in *New York v. United States*, *supra*, although "with some trepidation," as it has served as "an infrequent basis for litigation." 112 S. Ct. at 2432. The Court in *New York* acknowledged that Guarantee Clause claims had been most frequently held nonjusticiable as political questions, under the *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581 (1849), line of cases. See, for example, *Baker v. Carr*, 369 U.S. 186, 218-219, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

The Court in *New York* noted that the elevation of the *Luther* doctrine to an invariable conclusion of non-justiciability in Guarantee Clause cases had not always been the rule. 112 S. Ct. at 2433. In *Reynolds v. Sims*, 377 U.S. 533, 582, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), for example, the Court found that "*some* questions raised under the Guarantee Clause are nonjusticiable." The *New York* Court "indulged the assumption" that the Guarantee Clause is an independent basis upon which a state can sue to enjoin the operation of a federal statute, although it ultimately found that both the monetary and access incentive provisions of the Low Level Radioactive Waste Policy Act were constitutional. The Court specifically examined whether, in light of such provisions, "the states . . . retain[ed] the ability to set their legislative agendas" and "state government officials

remain[ed] accountable to their electorates." 112 S. Ct. at 2433.

This Court had earlier relied upon the Guarantee Clause in its decision in *Gregory v. Ashcroft*, *supra*, which upheld a mandatory retirement provision for state judges contained in Missouri's Constitution in the face of a challenge based on the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, and the Equal Protection Clause of the U.S. Constitution. U.S. Constitution, amend. XIV, section 1.

Earlier opinions of this Court also lend guidance as to the meaning of the Guarantee Clause. In *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627 (1876), the Court looked to the governments of the states as constituted at the time of adoption of the Constitution. As there stated:

> The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All the states had governments when the Constitution was adopted. In all, the people participated to some extent, through the representatives elected in the manner specifically provided. The governments and the Constitution did not change. They were accepted precisely as they were, and it is, therefore to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution. 22 L. Ed. at 631.

The Court in *In re Duncan*, 139 U.S. 449, 462, 11 S. Ct. 573, 35 L. Ed. 219 (1891), described the republican form of government as follows:

> The distinguishing feature of that form is the right of the people to choose their own officers for governmental administration and *pass their own laws* in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves. . . . (Emphasis supplied).

See, also, the respect paid to state legislative action with regard to a Guarantee Clause claim in *Kies v. Lowrey*, 199 U.S. 233, 239, 26 S. Ct. 27, 50 L. Ed. 167 (1905).

The Guarantee Clause demands political accountability. As one commentator noted:

> [O]nly proper enforcement of the Guarantee Clause and application of the theory of political accountability that inheres in its text can support a federalist jurisprudence that safeguards state autonomy from unreasonable federal encroachment without unduly shackling national power. Note, *The Supreme Court – Leading Cases*, 106 Harv. L. Rev. 163, 178 (1992).

Section 601, by depriving the state legislatures of their own choice with regard to whether their long-recognized *intrastate* motor carrier industries should be regulated economically, and, if so, the degree of regulation which should exist based on each state's own characteristics, has destroyed that political accountability, in violation of the Guarantee Clause. The same is true with regard to the wide variety of other state business laws caught up in this preemptive dragnet. The states have not retained the ability to set their own legislative agendas under Section 601. Likewise, state government officials are no longer accountable to their citizens within the context of overall truck operations. They cannot govern under this proscription.

Indeed, this constitutional provision has much more significance "than an endorsement of representative democracy." *The Supreme Court*, *supra*, at 180. It is concerned with the triangular relationship between the national government, the state governments and the citizenry. As stated therein:

> The Guarantee Clause bolsters that triangular relationship by mandating a particular form of interaction between state governments and their citizens: *each state must retain its freedom to set its legislative agenda in accordance with the goals of its citizenry; and the people of each state must be assured the opportunity for meaningful participation in their community's political life*. Both the

> legitimacy of state government and the effectiveness of the people's political participation turn on accountability – the link between the representatives and the represented. (Emphasis supplied). *Id.* at 181.

The Court underscored this factor in *New York*, albeit in terms of the Tenth Amendment analysis. 112 S. Ct. at 2424. That analysis has equal applicability to the Guarantee Clause, as the above commentary demonstrates.

Congress, by enacting this bald prohibition against regulation and denying the states the ability to regulate this vital area of their economies consistent with the interstate scheme as exists on a national level, has destroyed this link between the representatives and the represented. Congress has prevented those elected representatives closest to the people, the state representatives, from performing their governmental function. There is no way in which Congress as a whole, with its 435 Representatives and 100 Senators, can be expected to be familiar with the rationale behind Montana's regulation of its motor carrier industry, or its commercial statutes of general application, when Montana has one vote in the House of Representatives and two votes in the Senate. The same principle holds true for Oklahoma, Kansas, and Michigan.

The freedom of the states to set their own legislative agendas in accordance with the goals of their citizens has been shackled here. States, such as Oklahoma and Michigan, have fine-tuned their motor carrier laws governing *intrastate commerce* on a regular basis to meet the particular needs of their economies. The Michigan Legislature overwhelmingly passed a significant overhaul of that state's law, as recently as December 24, 1993, after five years of study and deliberation.[25] That law, which took effect January 13, 1994, had a lifespan of less than one year, before it was eviscerated by Section 601.

Section 601 infringes upon the Guarantee Clause. The law should be held unconstitutional on this basis.

---

[25] The Michigan law had also been significantly rewritten in 1982.

CONCLUSION

Section 601 of the FAAAA is unconstitutional, under this Court's decisions in *New York* and *Hodel*. The lower courts have not correctly analyzed the constitutional questions presented by the Petitioners and the flawed manner in which Congress has chosen to preempt state regulation of intrastate motor carrier transportation. The "negative freedom" extended to the states by the Section 601 prohibition is tantamount to a compulsion. This case cannot be pigeonholed as one of the traditional types of preemption. The extent of the preemption and the creation of a two-tiered system of regulation of interstate commerce and non-regulation of intrastate commerce set this case apart. Congress has refused to occupy the field, but has instead chosen to permit intrastate motor carriers to travel upon the roads of our states completely unregulated. Section 601 is in fact violative of the Tenth Amendment, the Commerce Clause, and the Guarantee Clause of the United States Constitution.

Respectfully submitted,[26]

The Coalition Against Federal Preemption of State Motor Carrier Regulation
By its counsel:
Robert E. McFarland*
Jennifer A. Hay
Foster, Swift, Collins & Smith, P.C.
32300 Northwestern Highway
Suite 230
Farmington Hills, Michigan 48334
Telephone: (810) 851-7500
Fax: (810) 851-7504

*Counsel of Record

---

[26] See Appendix H for the names of the additional parties and their counsel jointly submitting this Petition.

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FRANK J. KELLEY, Attorney General of the State of Michigan, THE OKLAHOMA CORPORATION COMMISSION; THE MONTANA PUBLIC SERVICE COMMISSION; COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Plaintiffs-Appellants,	)	Nos 95-6000 95-6033 (Filed Nov. 2, 1995)
CARLA STOVALL, Attorney General of the State of Kansas, KANSAS CORPORATION COMMISSION Plaintiffs-Intervenors-Appellants,	)	
v.	)	
THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO, Attorney General of the United States, Defendants-Appellees.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-94-1999)

W. Robert Alderson and John E. Jandera of Alderson, Alderson & Montgomery, Topeka, Kansas, (Robert E. McFarland of Foster, Swift, Collins & Smith, Farmington Hills, Michigan; Frank J. Kelley, attorney general, Thomas L. Casey, solicitor general, and Kelly G. Keenan, assistant deputy attorney general, Lansing Michigan; Leslie Wilson Pepper, Charles "Andy" Adams, Oklahoma City, Oklahoma; Martin Jacobson, Helena, Montana; Richard C. Labarthe, Kevin M. Coffey, and Jack C. Moore of Mock, Schwabe, Waldo, Elder, Reeves & Bryant, Oklahoma City, Oklahoma; Dale E. Isley of Williams & Isley, Denver, Colorado; Marc J. Fink and Torbjorn Sjogren of Sher & Blackwell, Washington, D.C., with them on the briefs), for the appellants.

Peter R. Maier, U.S. Department of Justice, Washington, D.C., (Leonard Schaitman, U.S. Department of Justice, Washington, D.C., with him on the brief), for the appellees.

Kenneth R. Nance, Oklahoma City, Oklahoma; Nicholas J. DiMichael, Frederic L. Wood, and Jeffrey O. Moreno of Donelan, Cleary, Wood & Maser, Washington, D.C., were on the brief for amici curiae, The National Industrial Transportation League, American Frozen Food Institute, and Americans for Safe and Competitive Trucking.

Before HENRY, SETH, and BRISCOE, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiffs, the Oklahoma Corporation Commission, the Montana Public Service Commission, the Kansas Corporation Commission, the Attorney General of the State of Michigan, the Attorney General of the State of Kansas, the Coalition Against Federal Preemption of State Motor Carrier Regulation, and the International Brotherhood of Teamsters, filed this action for declaratory and injunctive relief claiming that § 601 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1604 (1994), was unconstitutional. After a trial on the merits, the district court issued a written opinion denying plaintiffs' claims for relief. We affirm the district court's dismissal of plaintiff's claims after concluding § 601 does not violate the Commerce Clause, the Tenth Amendment, or the Guarantee Clause.

I.

Section 601 of the Federal Aviation Administration Authorization Act of 1994 was enacted by the 103rd Congress, 2nd Session, on August 23, 1994, was signed into law by President Bill Clinton, and took effect on January 1, 1995. Section 601 effectively preempts, with a few minor exceptions, state regulation of intrastate motor

carrier activities. In particular, § 601 amends 49 U.S.C. § 41713(b)(4) to read as follows:

> (4) Transportation by air carrier or carrier affiliated with a direct air carrier.
>
> (A) General rule. Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).
>
> (B) Matters not covered. Subparagraph (A)
>
> (i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and
>
> (ii) does not apply to the transportation of household goods, as defined in section 10102 of this title.

(C) Applicability of paragraph (1). This paragraph shall not limit the applicability of paragraph (1).

Pub. L. No. 103-305, 108 Stat. 1605, 1606 (1994).

Section 601 also amends 49 U.S.C. § 11501 by adding subsection (h), which reads as follows:

(h) Preemption of State economic regulation of motor carriers.

(1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b) (4) of this title) or any motor private carrier with respect to the transportation of property.

(2) Matters not covered. Paragraph (1)

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(B) does not apply to the transportation of household goods.

(3) State standard transportation practices.

(A) Continuation. Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules, or

(iv) antitrust immunity for joint line rates or routes, classifications and mileage guides, if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this subtitle or a regulation issued by the Interstate Commerce Commission or the Secretary of Transportation under this subtitle; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

> (C) Election. Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

Pub. L. No. 103-305, 108 Stat. 1606 (1994).

II.

We review the district court's interpretations of law de novo, and any relevant findings of fact for clear error. *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 826 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993).

III.

As a preliminary matter, we must address whether this court has subject matter jurisdiction to consider plaintiffs' claims. The Department of Justice asserts that neither of the jurisdictional bases cited in plaintiffs' complaint, 28 U.S.C. § 1331 (the federal question statute and 28 U.S.C. §§ 2201-2202 (the Declaratory Judgment Act), waives the sovereign immunity of the United States. Further, the Department argues the Administrative Procedure Act (APA) 5 U.S.C. § 701 *et seq.*, which was relied upon by the district court but was not cited in plaintiffs' complaint, has no application in this case because, according to the Department, no agency has acted pursuant to the challenged provisions of § 601.

Sovereign immunity generally bars suits against the United States or its agencies, whether brought by a private party or by a state. *Block v. North Dakota*, 461 U.S. 273, 280 (1983). Thus, under sovereign immunity principles, the United States may be sued only if and to the extent that it consents. *United States v. Dalm*, 494 U.S. 596, 608 (1990). " '[T]he terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). "Such a waiver of sovereign immunity must be strictly construed in favor of the sovereign and may not be extended beyond the explicit language of the statute." *Fostvedt v. United States*, 978 F.2d 1201, 1202 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1589 (1993).

Significantly, the doctrine of sovereign immunity is not always applicable to suits filed against federal entities or officials. In particular, one of the well-established exceptions to the doctrine limits its application in declaratory and/or injunctive suits against federal entities or officials seeking to enjoin the enforcement of an unconstitutional statute. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949); *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 574 (10th Cir. 1984); *Kozera v. Spirito*, 723 F.2d 1003, 1008 (1st Cir. 1983). As the Court noted in *Larson*, the doctrine does not apply in such cases because "the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the sovereign." 337 U.S. at 690. "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess."

Tenneco Oil Co., 725 F.2d at 574. We find this exception applicable to the claims filed by plaintiffs in this case.

IV.

The Commerce Clause of the United States Constitution, provides that Congress shall have the Power "[t]o regulate Commerce . . . among the several States," Art. 1, § 8, cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . . " Art. 1, § 8, cl. 18.

Recently, in *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Supreme Court identified three broad categories of activity that Congress may regulate under the Commerce Clause: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30. With respect to the third category of activity, the Court emphasized that it had repeatedly "upheld a wide variety of congressional Acts regulating intrastate economic activity where [it had] concluded that the activity substantially affected interstate commerce." 115 S. Ct. at 1630.

Here, we find that the activity at issue, state regulation of intrastate motor carrier activities, falls squarely within the third category of activity cited in *Lopez*. In enacting § 601, Congress made express findings, set forth in subsection (a) of § 601, that state regulation of

intrastate motor carrier activities substantially affects interstate commerce:

> (1) [T]he regulation of intrastate transportation of property by the States has
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> (B) impeded the free flow of trade, traffic and transportation of interstate commerce; and
>
> (C) placed an unreasonable cost on the American consumers; and
>
> (2) certain aspects of the State regulatory process should be preempted.

Pub. L. No. 103-305.

These findings are further supported by the House Report that accompanied § 601. Therein, the House of Representatives specifically noted as follows:

> State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. According to Department of Transportation estimates, preemption of State economic regulation could eventually yield $3-8 billion per year in savings. Other estimates put the savings as high as $5-12 billion. The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business. In hearings held on this issue, numerous examples have been cited in which rates for shipments within a state exceed rates

> for comparable distances across state lines. In the small package express business, companies frequently ship goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments. Lifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service options will be dictated by the marketplace; and not by an artificial regulatory structure.

H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. (1994).

We believe these findings are rational. *See Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 276 (1981). Granted, there are undoubtedly various state regulations that affect and pertain only to purely intrastate motor carrier activities, and have little or no effect on interstate commerce. Nonetheless, Congress rationally determined the regulation of intrastate motor carrier activities, considered as a whole, does in fact impact and impede interstate commerce.

Having determined that state regulation of intrastate motor carrier activities is an "activity" that may be regulated by Congress under the Commerce Clause, the only remaining question is whether "the means chosen by [Congress] [are] reasonably adapted to the end permitted by the Constitution." *Hodel*, 452 U.S. at 276. Plaintiffs set forth several reasons why § 601 is not reasonably adapted to the end sought by Congress. First, plaintiffs claim § 601 is overly broad and preempts not only state economic regulation of intrastate trucking, but also "state tort laws, state antitrust laws, state consumer protection laws, state laws regarding cargo loss and damage claims, state laws

governing the transportation of solid and hazardous waste, and state uniform commercial codes." Appellants' br. at 20. Second, plaintiffs argue that the overbreadth of § 610 "has created a disjointed two-tiered system of regulation," in which interstate carriers are regulated by Congress, but in which purely intrastate carriers remain wholly unregulated. Appellants' br. at 21-22. Finally, plaintiffs argue that § 601 is improper because it preempts state law "in favor of nothing." Appellants' br. at 23.

Notwithstanding plaintiffs' arguments, the means chosen by Congress are reasonably adapted to the ends sought by Congress. First, § 601's preemption of state regulations pertaining to "price[s], route[s], or service[s]" of intrastate motor carriers clearly serves to eliminate the "patchwork" of varying state regulations that concerned Congress. Second, although § 601 undoubtedly preempts a wide range of state regulations, it is far from clear that its impact is as far-reaching as plaintiffs would have the court believe. In fact, as pointed out by the Department of Justice, many of the examples cited by plaintiffs are purely speculative and are based upon an interpretation of § 601 not shared by the Department of Justice or the Department of Transportation. Moreover, although plaintiffs claim that § 601 will preempt state legislation of garbage and recyclable collection, representatives from Congress, as well as the Interstate Commerce Commission, have indicated it will not. 140 Cong. Rec. E2204-03 (daily ed. Oct. 7, 1994) (statement by Rep. Mineta). Third, assuming the rationality of Congress' findings with respect to the negative impact of state regulations on interstate commerce, what choice did Congress have

except to enact a statute that preempts a fairly broad range of state economic regulations? In any event, the Supreme Court rejected the notion of second-guessing Congress by belatedly reviewing other possible legislative options. *See South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190 (1938). Finally, although § 601 may have had some unintended effects, such as freeing the reins on intrastate towing and wrecker services, plaintiffs have not cited any cases holding that unintended effects of legislation, by themselves, serve to make the legislation irrational for purposes of Commerce Clause analysis.

For these reasons, the district court properly concluded that § 601 does not violate the Commerce Clause.

V.

The Tenth Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *New York v. United States*, 112 S. Ct. 2408, 2417 (1992), the Supreme Court noted that "[i]n a case . . . involving the division of authority between federal and state governments," the inquiries under the Commerce Clause and the Tenth Amendment "are mirror images of each other." Specifically, the Court noted as follows:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is

> necessarily a power the Constitution has not conferred on Congress.

Id.

Thus, even if plaintiffs are correct in their assertion that § 601 intrudes upon a domain traditionally left to the states, it is constitutional as long as it falls within the commerce power. *Gregory v. Ashcroft*, 501 U.S. at 460 (holding that Congress may impose its will on the states as long as it is acting within the powers granted by the Constitution); *United States v. Lopez*, 2 F.3d 1342, 1346-47 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995). Having concluded that § 601 was a proper exercise of the commerce power by Congress, the only remaining question we must decide is whether Congress, in enacting § 601, somehow "commandeer[ed] the legislative processes of the States . . . . " *Hodel*, 452 U.S. at 288.

Plaintiffs argue that § 601 violates the Tenth Amendment because it does not give the states a choice between regulating in a fashion consistent with federal regulation of motor carriers or having their state regulatory scheme preempted by a federal regulatory scheme, but instead compels the states not to regulate at all. In addition, plaintiffs assert that enactment of § 601 has created a "two-tiered system" which allows Congress to "hide behind the states and avoid accountability." Appellants' br. at 35. Specifically, plaintiffs claim this two-tiered system "creates the false impression that state governments are unresponsive to their electorate's needs, while the federal government, which continues to regulate, is addressing their needs." Appellants' br. at 35.

Neither of plaintiffs' arguments is meritorious. In *New York*, the Court reaffirmed that Congress may not exercise its Article I plenary powers to " 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " 112 S.Ct. at 2420 (quoting *Hodel*, 452 U.S. at 288). Notwithstanding these limitations, however, Congress does enjoy "several options short of imposing a coercive regulatory directive on the states." *Ponca Tribe of Okla. v. Oklahoma*, 37 F.3d 1422, 1433 (10th Cir. 1994). First, Congress may, under its spending power, attach conditions on the states' receipt of federal funds. *Id.* Second, Congress can offer the states the choice of regulating a given activity in accordance with federal standards or having state law preempted by federal regulation. *Id.* Finally, Congress may, under the Supremacy Clause, "preempt an entire field of regulation and thereby deprive the states of any regulatory role." *Id.*

Here, Congress has clearly chosen the third option, to preempt the entire field of price, service, and route regulation of intrastate motor carrier activities. Although plaintiffs have attempted to otherwise characterize Congress' actions, it is clear that Congress has not compelled the states to voluntarily act by enacting or administering a federal regulatory program. Rather, Congress has simply imposed rules on the states via its Supremacy Clause powers. *See* Laurence H. Tribe, *American Constitutional Law* § 6-25 (2d ed. 1988) ("So long as Congress acts within an area designated to it, the preemption of conflicting state or local action . . . flow[s] directly from the substantive source of power of the congressional action coupled with the supremacy clause of article VI . . . . "). Thus,

contrary to plaintiffs' assertions, there is no risk that the states will be held politically accountable for the actions of the federal government. Instead, it is abundantly clear that the federal government is responsible for the lack of intrastate motor carrier price, route, and service regulation.

We affirm the district court's denial of plaintiffs' Tenth Amendment challenge to § 601.

VI.

The Guarantee Clause of the Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . . " Art. IV, § 4.

In their final argument, plaintiffs contend § 601 violates the Guarantee Clause because it "has so infringed upon state sovereignty that the guarantee of a republican form of government has been breached." Appellants' reply br. at 24. Plaintiffs offer no further explanation of this argument, nor do they cite any case law in support of their position. In response, the Department of Justice asserts that plaintiffs' argument is undermined by the fact that § 601 was unanimously passed in both the Senate and the House of Representatives, without objection by any of the elected senators or representatives from any of the forty-one states that, prior to January 1, 1995, regulated intrastate motor carrier activities. Moreover, the Department suggests that plaintiffs cannot assert a justiciable claim under the Guarantee Clause. Finally, the Department argues plaintiffs cannot succeed on such a claim in this case because "Section 601 is a substantive

constraint on the power of state governments to regulate intrastate trucking, not a fundamental restructuring of the form of state governments," and therefore the treatise cited by plaintiffs provides no support for plaintiffs' claim. Appellees' br. at 30.

In *New York*, the Supreme Court discussed, but did not resolve, the question of whether claims under the Guarantee Clause are justiciable. 112 S.Ct. at 2432-33. In particular, the Court noted that, since its decision in *Luther v. Borden*, 7 How. 1 (1849), there has been some belief that violations of the Guarantee Clause cannot be challenged in the courts because they present nonjusticiable political questions. 112 S. Ct. at 2433. Continuing, the Court noted it has suggested, in more recent opinions, that this belief may be incorrect, and that "not all claims under the Guarantee Clause present nonjusticiable political questions." *Id.* However, the Court ultimately found it unnecessary to "resolve this difficult question . . . . " *Id.*

In *American Constitutional Law* § 5-23, the Guarantee Clause is discussed in the following manner:

> The most fundamental threats to state sovereignty – those that genuinely portend reduction of the states into "field offices of the national bureaucracy" or "bureaucratic puppets of the Federal Government" – would seem to arise less from federal laws that impose *substantive* constraints on state and private actors alike . . . than from federal laws that *restructure* the basic institutional design of the system a state's people choose for governing themselves. If there is any form of congressional assault that might truly " 'nibble away at state sovereignty, bit by bit, until someday essentially nothing is

> left but a gutted shell,' " it is an assault on those "democratic processes through [which] . . . citizens . . . retain the power to govern . . . their local problems."

Assuming, without deciding, that plaintiffs' claim is justiciable, there appears to be no merit to it. As noted by the Department of Justice, "Section 601 is a substantive constraint on the power of state governments to regulate intrastate trucking, not a fundamental restructuring of the form of state governments." Appellees' br. at 30. More specifically, having concluded that § 601 does not violate the Commerce Clause or the Tenth Amendment, it is difficult to understand how § 601 could be construed in any way as affecting the states' ability to structure their own governments as they see fit. The district court was correct in denying this claim.

VII.

The district court's denial of plaintiffs' claims for declaratory and injunctive relief is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE OKLAHOMA CORPORATION COMMISSION; THE MONTANA PUBLIC SERVICE COMMISSION; COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION; and THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Plaintiffs, ROBERT T. STEPHAN, Attorney General of the State of Kansas; THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; and FRANK J. KELLEY, Attorney General of the State of Michigan, Intervenor Plaintiffs, v. THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO, Attorney General of the United States, Defendants.	CIV-94-1999-R (Filed Dec. 30, 1994)

MEMORANDUM OPINION AND ORDER

Plaintiffs The Oklahoma Corporation Commission, The Montana Public Service Commission, Coalition Against Federal Preemption of State Motor Carrier Regulation and The International Brotherhood of Teamsters

filed this action on December 2, 1994, challenging the constitutionality of Section 601 of the Federal Aviation Administration Authorization Act of 1994 ("FAAA") Pub. L. No. 103-305, § 601, 108 Stat. 1605, 1606-07 (1994), under the Commerce Clause, Art. I, § 8 of the United States Constitution, the Tenth Amendment to the United States Constitution and the Guarantee Clause, Art. IV, § 4 of the United States Constitution. By their Complaint, Plaintiffs seek a declaratory judgment that Section 601 of the FAAA is unconstitutional and void and injunctive relief. On the same day that they filed their Complaint, Plaintiffs filed a motion for a preliminary injunction and brief in support requesting that the Court enjoin Defendants United States of America ex rel. The Department of Justice and Janet Reno, Attorney General of the United States from enforcing Section 601 of the FAAA or from taking any action against any state or local government to compel compliance with that section while or until such time as the Court considers the merits of this matter.

Robert T. Stephan, Attorney General of the State of Kansas, The State Corporation Commission of the State of Kansas and Frank J. Kelley, Attorney General of the State of Michigan, were granted leave to intervene as parties Plaintiff herein. The Intervening Plaintiffs also filed motions for a preliminary injunction. Those motions were consolidated with the original Plaintiffs' motion, an evidentiary hearing on which had been previously set for December 27, 1994.

On December 21, 1994, Defendants filed a motion to dismiss Plaintiffs' Complaint on the grounds that the Court lacks jurisdiction to consider any of the Plaintiffs' claims because Plaintiffs have failed to allege a waiver of

sovereign immunity and lack standing to maintain this action. Defendants also responded to Plaintiffs' motion for a preliminary injunction in a memorandum filed in support of Defendants' motion to dismiss and in opposition to Plaintiffs' motion for a preliminary injunction. In a telephone conference between counsel for all parties and the Court on December 22, 1994, the parties agreed to forego an evidentiary hearing on the preliminary injunction; to advancement of the trial of this action on the merits and consolidation of the motions for a preliminary injunction with trial on the merits; to submission of the motions and the merits upon the briefs, affidavits and other documentary evidence; and to the presentation of oral argument, only, at the time previously set for an evidentiary hearing, December 27, 1994 at 9:30 a.m. That agreement was memorialized in an Order entered December 27, 1994.

The Court has reviewed the pleadings, briefs and evidentiary submissions of the parties and has heard arguments of counsel on behalf of all parties. In addition, the Court has read the numerous amicus curiae briefs filed herein. The Court now enters its findings of fact and conclusions of law.

I. JURISDICTION

A. Sovereign Immunity

This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331. The Department of Justice and the Attorney General of the United States are agencies or authorities of the Government of the United

States within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* *See* 5 U.S.C. § 701(b)(1). *Accord Morris v. Gressette,* 432 U.S. 491, 500, 501, 97 S.Ct. 2411, 2418-2419, 53 L.Ed.2d 506, 516-517 (1977); *Black Hills Institute of Geological Research v. South Dakota School of Mines & Technology,* 12 F.3d 737, 740 (8th Cir. 1993), *cert. denied,* ___ U.S. ___, 115 S.Ct. 61, 130 L.Ed.2d 18 (1994); *Banzhaf v. Smith,* 737 F.2d 1167, 1168 (D.C. Cir. 1984) (implicitly concluding that the Attorney General of the United States is an agency or authority of the Government of the United States within the meaning of the APA); *Paradyne Corp. v. United States Department of Justice,* 647 F. Supp. 1228, 1231-33 (D.D.C. 1986); *Church of Scientology of California v. Linberg,* 529 F. Supp. 945, 967-69 (C.D. Calif. 1981) (recognizing that the United States Department of Justice is an agency to which the waiver of sovereign immunity in Section 702 of the Administrative Procedure Act applies). *See also* H.R. Rep. No. 1656, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123 & 6125 (1976 Amendment to the Administrative Procedure Act was intended to eliminate the defense of sovereign immunity in non-statutory review actions, including those to review functions or actions of "the older executive departments, such as the Departments of State, Defense, Treasury, Justice, Interior or Agriculture" for which there are no special statutes providing procedures for reviewing their actions).

Plaintiffs seek relief other than money damages, specifically declaratory and injunctive relief, based upon the assertion that anticipated enforcement of Section 601

of the FAAA by Defendants[1] will be unlawful inasmuch as Section 601 is assertedly unconstitutional. *See* 5 U.S.C. § 702 and H.R. Rep. No. 1656, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123 (the amendment to § 702 "would eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency.") No other statute which grants consent to sue the United States or the Defendants herein expressly or impliedly forbids the relief which is sought herein. *See* 5 U.S.C. § 702. Accordingly, Sections 702 and 703 of the APA constitute a waiver of sovereign immunity for this action. *See A.E. Finley & Associates, Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989); *Blassingame v. Secretary of the Navy*, 811 F.2d 65, 69-70 (2nd Cir. 1987), *rev'd on other grounds following remand*, 866 F.2d 556 (2d Cir. 1989); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 723-28 (2nd Cir. 1983); *Warin v. Director, Department of Treasury*, 672

---

[1] Defendants assert that Section 601 of the FAAA is self-executing and argue that they have no authority to enforce it. They stated that they will not bring suit against a state or state officers who continue to enforce state laws and regulations pertaining to price, route or service of motor carriers or motor private carriers transporting property. But the Attorney General of the United States could clearly bring suit on behalf of the United States to assert and protect its sovereign power to regulate commerce. *See Sanitary District of Chicago v. United States*, 266 U.S. 405, 425-26, 45 S.Ct. 176, 178, 69 L.Ed.2d 352 (1925); *United States v. State of Maryland*, 488 F. Supp. 347, 361-65 (D. Md. 1980), and without doubt would.

F.2d 590, 592 (6th Cir. 1982); *Beller v. Middendorf*, 632 F.2d 788, 797 (9th Cir. 1980), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981). *Cf. State of New Mexico v. Regan*, 745 F.2d 1318, 1321-22 (10th Cir. 1984) (recognizing that Section 702 of the Administrative Procedure Act contains a limited waiver of the United States' sovereign immunity but concluding that that waiver was inapplicable in the case before it because the Tucker Act, 28 U.S.C. §§ 1346, 1491, granted consent to suit and expressly or impliedly forbids suit in district court which is essentially one to recover money in excess of $10,000 which the government owns), *cert. denied*, 471 U.S. 1065, 105 S.Ct. 2138, 85 L.Ed.2d 496 (1985).

Alternatively, in the event Sections 702 and 703 of the APA do not constitute a waiver of sovereign immunity which is applicable to this case, the Court concludes that sovereign immunity does not preclude at least declaratory relief herein, which does not require expenditure of funds from the public treasury or domain, interfere with public administration or restrain the federal government from acting or compel it to act, *see Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, ___, 10 L.Ed.2d 15, 23 (1963), and that Defendant Janet Reno, Attorney General of the United States, may, in her individual capacity, be enjoined from enforcing an unconstitutional federal statute, if indeed it is unconstitutional. *See Dugan v. Rank*, 372 U.S. at 621-22, 83 S.Ct. at ___, 10 L.Ed.2d at 24-25.

B. Standing

Plaintiffs' standing herein, which Defendants challenge, requires the existence of an injury in fact that is

both "concrete" and "particularized," meaning that the injury must affect the Plaintiffs in a personal and individual way, and "actual or imminent," not conjectural or hypothetical; a causal connection between the injury and the conduct of which Plaintiffs complain, i.e., the injury must be "fairly traceable" to the Defendants' conduct and not the result of an independent action of a third party; and that it is likely, as opposed to merely speculative, that the injury will be redressed by a decision in Plaintiffs' favor. *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 112 S.Ct. 2130, ___, 119 L.Ed.2d 351, 364 (1992); *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, ___, 82 L.Ed.2d 556, 569-70 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, ___, 70 L.Ed.2d 700, 709 (1982); *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1450 (10th Cir. 1994). Plaintiffs have the burden of pleading and proving standing. *Lujan, supra*, 504 U.S. at ___, 112 S.Ct. at ___, 119 L.Ed.2d at 364-65; *Mount Evans Co., supra*, 14 F.3d at 1450.

Plaintiff Coalition Against Federal Preemption of State Motor Carrier Regulation is an unincorporated association of shippers, motor carriers of general freight, household goods, construction materials and other commodities, tow truck operators, tariff bureaus and other interested parties, including the Coalition of Dump Truck Ratepayers, an unincorporated organization of users, shippers, consumers and ratepayers of construction materials transported by regulated motor carriers of construction materials in California. *See* Affidavit of Daniel W. Baker, Western Coordinator of Plaintiff Coalition (Exhibit "E-1" to Plaintiffs' Joint Combined Response to Defendants' Motion to Dismiss and Reply to Defendants'

Response to Motion for Preliminary Injunction) at ¶¶ 2 & 3.) Plaintiff Coalition's members are located in forty-one states, *see* Attachment to Baker Affidavit, most if not all of which have regulatory statutory programs which govern intrastate motor carrier transportation. A substantial number of Plaintiff Coalition's members are relatively small motor carriers. Baker Affidavit at ¶ 2. Plaintiff Coalition has standing to bring suit on behalf of its members if its members, or any of them, would otherwise have standing to sue in their own right; the interests Plaintiff Coalition seeks to protect are germane to the association's purpose; and neither the claims asserted nor the relief requested requires the participation of the individual members in the suit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *Kansas Health Care Association, Inc. v. Kansas Department of Social and Rehabilitation Services*, 958 F.2d 1018, 1021 (10th Cir. 1992).

Individualized proof is not required to prove that Section 601 is unconstitutional nor to obtain the declaratory and injunctive relief sought. Plaintiff Coalition was organized for the specific purpose of participating as a party plaintiff in this proceeding; thus the interests the Coalition seeks to protect are effectively identical to the Coalition's purpose. The Court concludes that at least some of Plaintiff Coalition's members have standing to sue in their own right. There is evidence before the Court that following partial deregulation of interstate motor carriers in 1980 by the Motor Carrier Act, the failure rate of the trucking industry relative to all industry grew dramatically and that since the beginning of 1980, over 19,000 trucking firms have failed, Affidavit of Dabney T.

Waring, Jr. at ¶¶ 9 & 10 (Exhibit "J" to Plaintiffs' Joint Combined Response to Defendants' Motion to Dismiss and Reply to Defendants' Response to Motion for Preliminary Injunction); that a majority of MC-82 LTL Carriers left the industry after deregulation but that in spite of this exodus, profitability of the remaining such carriers has remained low, *see* Affidavit of Irwin H. Silberman at ¶¶ 8-10 (Exhibit "I" to Plaintiffs' Joint Combined Response); that 144 Class I and II ICC regulated motor carriers of general freight went out of business after 1980, Affidavit of Mark T. Gaffney (Exhibit "A" to Plaintiffs' Response and Reply Brief) at ¶ 8 & Exhibit "A" thereto; and that 30 Oklahoma based motor carriers terminated their operations, Affidavit of Richard W. Nelson (Exhibit "D" to Plaintiffs' Response and Reply Brief) at ¶ 4. The Court is persuaded by this evidence and opinion evidence before the Court that intrastate deregulation effected by Section 601 of the FAAA will result in similar consequences. It thus concludes that at least the motor carrier members of Plaintiff Coalition, or some of them, will suffer imminent injury in a personal way as a result of Section 601 of the FAAA and enforcement thereof. The injuries of those Coalition members are fairly traceable to Defendants' inevitable enforcement of Section 601 and likely to be redressed by the requested declaratory and injunctive relief. Accordingly, the Court concludes that Plaintiff Coalition has associational standing herein.

Plaintiff The International Brotherhood of Teamsters ("IBT") is an unincorporated association and labor union which exists, in part, to represent drivers or operators of commercial vehicles located in all 50 states for collective bargaining over rates of pay, hours, working conditions

and benefits. Plaintiff IBT also has associational standing. *See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986) (union subject to associational standing requirements). There is evidence that as a result of partial deregulation of interstate trucking, between 160,000 and 180,000 unionized jobs in the trucking industry have been eliminated. *See* Gaffney Affidavit at ¶ 8 and Declaration of Edward H. Rastatter (attached to Memorandum in Support of Defendants' Motion to Dismiss, and in Opposition to Plaintiffs' Motion for a Preliminary Injunction) at ¶ 11. Although there is evidence that about 150,000 new jobs with union carriers have been created in the trucking services industry,[2] *see* Rastatter Declaration at ¶ 11, the evidence is that many of these jobs are part-time and others are at reduced compensation and reduced benefits. Gaffney Affidavit at ¶ 11. Based upon this evidence as well as opinion evidence before the Court, the Court finds that deregulation of intrastate commerce effected by Section 601 of the FAAA and enforcement thereof is likely to or will result in the loss of a significant number of union members' jobs. In addition to the loss of unionized trucking jobs, injuries to Plaintiff IBT's members which are

---

[2] There is also evidence of an increase of 21 percent in the number of truck drivers over the period from 1983 to 1991 and that since 1980, about 500,000 new jobs exist in trucking services, including approximately 471,000 new truck driver jobs. Rastatter Declaration at ¶ 11, citing U.S. Bureau of Labor Statistics household surveys. These figures show that the new jobs in the trucking industry reflect, to a certain extent, the substitution of non-union jobs for union jobs. *Id.*

also concrete and personal to them but of greater immediacy or imminence are the increase in hours driven and the decrease in wages which will occur as many new carriers enter the intrastate market, large existing companies cut rates and trucking firms cut costs and force greater production out of their employees to remain competitive, replicating what occurred following partial deregulation of interstate trucking.[3] *See* Silberman, Gaffney and Nelson Affidavits. These injuries are concrete and personal to Plaintiff IBT's members and sufficiently imminent to give Plaintiff IBT's members, or at least some of them, the requisite stake in the outcome of this controversy. There is a causal connection between the IBT members' imminent injuries and deregulation of intrastate trucking effected by Section 601 of the FAAA and enforcement thereof by Defendants. These injuries are redressable by a declaratory judgment that Section 601 is unconstitutional and an injunction against its enforcement by Defendants. Thus, at least some of Plaintiff IBT's members would have standing in their own right to litigate the claims brought by Plaintiff IBT. There can be no doubt that the interests Plaintiff IBT seeks to protect herein – its members' jobs, wages and benefits – are germane to the very purposes for which Plaintiff IBT exists. Neither the claims that Section 601 is unconstitutional nor the requested declaratory and injunctive relief

---

[3] In making these findings, the Court is not voicing any opinion on the ultimate wisdom of intrastate deregulation. That is a political decision for Congress. There is ample evidence that deregulation will create new jobs in the economy, *see* note 2, *supra*, and result in a more competitive environment in the trucking industry and thus lower costs to consumers.

require individualized proof and/or participation of union members.

Plaintiff The Oklahoma Corporation has the power and duty to regulate the for-hire intrastate transportation of property by motor vehicle in a manner consistent with the public policy objectives and legislative intent expressed in the Oklahoma Constitution and in the Oklahoma Motor Carrier Act and to this end has promulgated and enforces the OCC Motor Carrier Rules. *See* Affidavit of Cody L. Graves (Exhibit "M" to Plaintiffs' Joint Combined Response) at ¶¶ 3-8. Plaintiff The Montana Public Service Commission is the public utility commission of the State of Montana. It has direct responsibility for administrating and enforcing the laws of Montana regulating intrastate motor carriers. *See* Affidavit of Wayne W. Bredt, Exhibit "A" to Brief in Support of Plaintiffs' Motion for Preliminary Injunction. Intervenor Plaintiff The State Corporation Commission of the State of Kansas is vested with the power and authority to license, supervise and regulate intrastate carriers in the State of Kansas and pursuant to its statutory authority, regulates the intrastate transportation of property from a price, route and service standpoint. *See* Affidavit of E. Jack Tierce. Intervenor Plaintiff Robert T. Stephan is the Attorney General of the State of Kansas. As the chief legal officer of the State of Kansas, Attorney General Stephan is charged with enforcing the laws of the State of Kansas, including those laws relating to the transportation of property. Intervenor Plaintiff Frank J. Kelley is the Attorney General of the State of Michigan. As the chief legal officer of the State of Michigan, Attorney General Kelley is charged with enforcing the terms of the Michigan Motor Carrier

Act, which provides for comprehensive economic regulation by the Michigan Public Service Commission of for-hire motor common and contract carriers operating in Michigan intrastate commerce from a route, price and service standpoint.

Although these Plaintiff State agencies and officers of their sovereign States assert their respective states' *parens patriae* interests in the safety and economic well-being of their citizens, because States do not have standing as *parens patriae* to bring an action against the Federal Government, *see Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 n. 16, 102 S.Ct. 3260, ___ n. 16, 73 L.Ed.2d 995, 1009 n. 16 (1982); *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 86 S.Ct. 803, ___, 15 L.Ed.2d 769, 784 (1966); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86, 43 S.Ct. 597, ___, 67 L.Ed. 1078, 1084 (1923), these Plaintiffs likewise do not have standing on that basis. Nevertheless, the Court concludes that these Plaintiff State officers and agencies of their respective States, as officers and agencies charged with the responsibilities of enforcing and administering the laws and regulations relating to intrastate motor carriers of their respective sovereign States, may assert the sovereign interests of their respective States, as sovereigns, in enacting and enforcing their own laws and in so doing, have standing to litigate the claims made herein. Not only will the interests of the States *qua* sovereigns in enacting and enforcing their own laws be in fact injured as a result of the enactment and enforcement of a federal law which preempts those state law [sic] and is assertedly

unconstitutional,[4] Plaintiff State officers and agencies have established that other more tangible (though no more real) injuries are imminent as a result of the effectiveness of Section 601 of the FAAA on January 1, 1995 and the enforcement thereof, for example, the loss of state revenue from registration fees which fund safety regulating activities.[5] *See* Affidavit of E. Jack Tierce at ¶ 2-4. These injuries to the States' legally protected interests as sovereigns are palpable and affect the States in a personal and individual way. The injuries are imminent. The injuries are fairly traceable to the conduct complained of, Defendants' enforcement of Section 601 of the FAAA, and are likely to be redressed, indeed are redressable, by the relief requested.

Defendants do not assert that any of the prudential rules of standing, apart from the minimum requirements for a "case or controversy" under Article III of the United States Constitution, other than those addressed above, counsel against according Plaintiffs standing to prosecute this action and the Court finds none.[6]

---

[4] In determining standing, the Court does not examine the merits of the Plaintiffs' claims. *See Kansas Health Care Association, Inc. v. Kansas Department of Social and Rehabilitation Services*, 958 F.2d at 1022.

[5] In addition, state agencies and officers may face a Hobson's Choice of either disregarding Section 601 and complying with their duties prescribed by their state constitutions and/or legislatures or complying with Section 601 and violating their charge under state law. *See* Graves Affidavit at ¶ 12.

[6] This Court's conclusions that this action is not barred by sovereign immunity and that the Plaintiffs herein have standing are not free from doubt. However, if the Court lacks jurisdiction to entertain this action, the ultimate result is the same: Plaintiffs are not entitled to the relief sought.

II. THE CONSTITUTIONALITY OF SECTION 601 OF THE FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT

Plaintiffs claim that the preemption of the state motor carrier economic regulation of intrastate commerce provided for in Section 601 of the FAAA violates the Tenth Amendment to the United States Constitution (Complaints at Count One); exceeds the powers granted to Congress to regulate commerce between the states by the Commerce Clause, Article 1, Section 8 of the United States Constitution (Complaints at Count Two); and is an invasion of state sovereignty and intergovernmental immunity, violative of the Guarantee Clause of Article 4, Section 4 of the United States Constitution (Complaints at Count Three). Thus, at issue herein are purely legal questions – the facial constitutionality of Section 601 of the FAAA under the Tenth Amendment to and the Commerce Clause and Guarantee Clause of the United States Constitution.

Section 601 of the FAAA, Pub. L. No. 103-305, Title VI, § 601(b)(1), (2)(A), (d), August 23, 1994, 108 Stat. 1605, 1606-1607, amends 49 U.S.C. § 41713(b)(4), effective January 1, 1995, to read as follows:

> **(4) Transportation by air carrier or carrier affiliated with a direct air carrier –**
>
> **(A) General rule.** – Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct

air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered. – Subparagraph (A) –

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 10102 of this title.

(C) Applicability of paragraph (1). – This paragraph shall not limit the applicability of paragraph (1).

Section 601 of the FAAA, Pub. L. No. 103-305, Title VI, § 601(c), (d), August 23, 1994, 108 Stat. 1606, 1607 amends 49 U.S.C. §§ 11501, effective January 1, 1995 by adding subsection (h) which reads as follows:

(h) Preemption of State economic regulation of motor carriers. –

(1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more

States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.

(2) Matters not covered. Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(B) does not apply to the transportation of household goods.

(3) State standard transportation practices. –

(A) Continuation. Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules, or

(iv) antitrust immunity for joint line rates or routes, classifications and mileage guides,

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. – A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this subtitle or a regulation issued by the Interstate Commerce Commission or the Secretary of Transportation under this subtitle; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election. – Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

Whether Section 601 of the FAAA is authorized under the power delegated to Congress under the Commerce Clause, Article I, Section 8 of the United States Constitution, and whether that Section invades the province of State sovereignty reserved by the Tenth Amendment are, as the United States Supreme Court recently

said, "two inquiries [which] are mirror images of each other." *New York v. United States*, 505 U.S. ___, ___, 112 S.Ct. 2408, ___, 120 L.Ed.2d 120, 137 (1992).

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty, reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.
>
> *New York v. United States*, 505 U.S. at ___, 112 S.Ct. at ___, 120 L.Ed.2d at 137.

Thus, it makes no difference which constitutional challenge this Court first addresses, that under the Tenth Amendment or that under the Commerce Clause. Under either analysis the Court must determine whether Congress in enacting Section 601 of the FAAA has overstepped the boundary between federal and state authority.

The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution provides that "Congress shall have thc Power . . . [t]o regulate Commerce . . . among the several States." Art. 1, § 8, cl. 3. Congress also has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . . " Art. 1, Sec. 8, cl. 18.

The scope of Congress' power under the Commerce Clause is plenary and extends not only to the use and instrumentalities of interstate commerce but to activities affecting interstate commerce, including purely intrastate commerce or activity. *Hodel v. Virginia Surface Mining*

Reclamation Association, Inc., 452 U.S. 264, 276-77, 101 S.Ct. 2352, ___, 69 L.Ed.2d 1, 16 (1981). There are no limitations upon Congress' power under the Commerce Clause except those contained in the Constitution. *Id.* Accordingly, the Court's inquiry to determine whether Section 601 of the FAAA is a valid exercise of Congressional power under the Commerce Clause, is limited to determining 1) whether Congress has made a finding that the regulated activity affects interstate commerce and if so, whether that finding is rational; and 2) whether the means chosen by Congress are reasonably adopted to achieve the end permitted by the Constitution, *Hodel, supra*, 452 U.S. at 276-77, 101 S.Ct. at ___, 69 L.Ed.2d at 15-16.

> Congress found as follows:
>
> (1) The regulation of intrastate transportation of property by the States has –
>
> > (A) imposed an unreasonable burden on interstate commerce;
> >
> > (B) impeded the free flow of trade, traffic and transportation of interstate commerce; and
> >
> > (C) placed an unreasonable cost on the American consumers; and
>
> (2) certain aspects of the State regulatory process should be preempted
>
> Section 601(a), Pub. L. 103-305.

The legislative history of Section 601 of the FAAA, as well as other evidence before the Court, demonstrates that there is a rational basis for Congress's finding that the

intrastate activity – state regulation of intrastate transportation of property – not only affects but unreasonably burdens interstate commerce[7]:

> Despite the movement toward deregulation by some individual states, the conferees believe preemptive legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. According to Department of Transportation estimates, preemption of State economic regulation could eventually yield $3 to $8 billion per year in savings. Other estimates put the savings as high as $5 to $12 billion. The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct the standard way of doing business. In hearings held on this issue, numerous examples have been cited in which rates for shipments within a state exceed rates for comparable distances across state lines. In the small package express business, companies frequently ship goods across state lines and back into the state of origin to

---

[7] Plaintiffs argue that the activity sought to be regulated must have a *substantial* affect [sic] on interstate commerce in order for Congress to constitutionally regulate it under the Commerce clause. Cases which predate *Hodel* support this argument, but in any event, Congress clearly found that the affect [sic] of state regulation of intrastate transportation of property on interstate commerce was "substantial" inasmuch as it found that it unreasonably burdened interstate commerce and that finding is rational in light of and fully supported by the legislative history.

> avoid the higher rates for purely intrastate shipments. Lifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service opinions will be dictated by the marketplace; and not by an artificial regulatory structure.
>
> H.R. Conf. Rep. No. 103-677, *reprinted at* 1994 U.S Code Cong. and Ad. News 1754, 1759-60.

There is no real dispute that the means chosen by Congress – express, broad preemption of state laws and regulations relating to price, route and service of intrastate motor carriers with respect to the transportation of property – are reasonably adapted to an end permitted by the Constitution, the regulation of interstate commerce and elimination of burdens and impediments to commerce among the States. Plaintiffs admit as much: "If the end Congress sought to achieve is the elimination of a burden on interstate commerce, then the means chosen . . . accomplishes that end."[8] Brief in Support of

[8] Plaintiffs do argue, however, that Congress cannot under the Commerce Clause preempt state law and not replace it with a federal regulatory scheme, as it has done here, because it is not then regulating interstate commerce under the Commerce Clause. Plaintiffs are simply wrong. In the exercise of its Commerce Clause power, Congress can choose to leave the field "to be controlled by the free play of economic forces." *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. ___, ___, 113 S.Ct. ___, ___, 122 L.Ed.2d 565, 575 (1993) (quoting *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140, 96 S.Ct. 2548, ___, 49 L.Ed.2d 396, ___ (1976)). Congress may do so implicitly, 122 L.Ed.2d at 576; it

Plaintiffs' Motion for Preliminary Injunction at p. 37. The Court concludes that the means chosen by Congress are reasonably adapted to achieve an end permitted under the Constitution.

The Tenth Amendment to the United States Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Section 601 of the FAAA does not "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," *New York v. United States*, 505 U.S. at ___, 112 S.Ct. at ___, 120 L.Ed.2d at 140 (*quoting Hodel supra*, 425 U.S. at 288, 101 S.Ct. at ___, 69 L.Ed.2d at 23-24); does not compel the States to enact legislation, *id., citing FERC v. Mississippi*, 456 U.S. 742, 765, 102 S.Ct. 2126, 72 L.Ed.2d 532, 551 (1982); and does not "compel the States . . . to prohibit" regulation of intrastate commerce, *see New York v. United States, supra*, at ___, 120 L.Ed.2d at 144 ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.") Indeed, Section 601 of the FAAA does not direct, coerce or even require

---

logically follows that it may do so explicitly, as it has done here and numerous other times. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 407, 422-23 (1992); *Morales v. TransWorld Airlines, Inc.*, ___ U.S. ___, 112 S.Ct. 2031, 119 L.Ed.2d 157, 167 (1992).

the States to do anything. Thus, Section 601 of the FAAA does not intrude on the sovereignty reserved to the States by the Tenth Amendment. *New York v. United States*, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 120. It is clearly constitutional.

The Guarantee Clause, Article IV, Section 4, of the United States Constitution directs the United States to "guarantee to every State in this Union a Republican Form of Government." U.S. Const. Art. IV, § 4. Assuming that Plaintiffs have not abandoned their claim that Section 601 violates the Guarantee Clause, the fairly ordinary exercise of Congress' power under the Commerce Clause and power to completely preempt state law, *see Morales v. TransWorld Airlines, Inc.*, ___ U.S. ___, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), cannot reasonably be said to deny any State a republican form of government. *See New York v. United States, supra*, at ___, 120 L.Ed.2d at 156.

CONCLUSION

The Court has jurisdiction over this action. Section 601 of the Federal Aviation Administration Authorization Act of 1994, preempting state law and regulation relating to price, route and service of motor carriers, motor carriers affiliated with direct air carriers and motor private carriers with respect to the transportation of property, is not unconstitutional under either the Commerce Clause or the Guarantee Clause of the United States Constitution and does not violate the Tenth Amendment to the United States Constitution. Plaintiffs' Complaints for declaratory and injunctive relief are DENIED. Defendants are entitled

to judgment on Plaintiffs' Complaint, which is entered concurrently herewith.

IT IS SO ORDERED this 30th day of December, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE OKLAHOMA CORPORATION COMMISSION; THE MONTANA PUBLIC SERVICE COMMISSION; COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION; and THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	CIV-94-1999-R
Plaintiffs,	)	
ROBERT T. STEPHAN, Attorney General of the State of Kansas; THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; and FRANK J. KELLEY, Attorney General of the State of Michigan,	)	
Intervenor Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO, Attorney General of the United States,	)	
Defendants.	)	

JUDGMENT

In accordance with this Court's Memorandum Opinion and Order entered this 30th day of December, 1994, denying the relief requested in Plaintiffs' Complaints herein, it is ORDERED, ADJUDGED and DECREED that Defendants have judgment on Plaintiffs' Complaints.

IT IS SO ORDERED this 30th day of December, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

APPENDIX C

U.S. CONSTITUTION

AMENDMENT X

Reserved powers to states

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX D

U.S. CONSTITUTION

COMMERCE CLAUSE

Art. 1, § 8, cl. 3

§ 8. Powers of Congress

Section 8. The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

APPENDIX E

U.S. CONSTITUTION

GUARANTEE CLAUSE

Article IV.

§ 4. Guarantee of republican form of government

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

APPENDIX F

49 U.S.C. § 11501. Interstate Commerce Commission Authority Over Intrastate Transportation

(h) Preemption of State economic regulation of motor carriers. –

(1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.

(2) Matters not covered. – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(B) does not apply to the transportation of household goods.

(3) State standard transportation practices. –

(A) Continuation. – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect

to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules, or

(iv) antitrust immunity for joint line rates or routes, classifications and mileage guides,

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) **Requirements.** – A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this subtitle or a regulation issued by the Interstate Commerce Commission or the Secretary of Transportation under this subtitle; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) **Election.** – Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

49 U.S.C. § 41713. Preemption of Authority Over Prices, Routes, and Service . . .

(b) Preemption. – . . .

(4) Transportation by Air Carrier or Carrier Affiliated With a Direct Carrier. –

(A) General rule. – Except as provided in subparagraph (B), a State, political subdivision of a State, or a political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered. – Subparagraph (A) –

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 10102 of this title.

(C) Applicability of paragraph (i). – This paragraph shall not limit the applicability of paragraph (1).

APPENDIX G

49 U.S.C. § 14501. Federal Authority Over Intrastate Transportation . . .

(c) MOTOR CARRIERS OF PROPERTY –

(1) GENERAL RULE – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) MATTERS NOT COVERED – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or

authorization of the owner or operator of the motor vehicle.

(3) STATE STANDARD TRANSPORTATION PRACTICES –

(A) CONTINUATION – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907), if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) REQUIREMENTS – A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) **Election** – Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a state, political subdivision, or political authority under this paragraph.

(4) **NONAPPLICABILITY TO HAWAII** – This subsection shall not apply with respect to the State of Hawaii.

APPENDIX H

-and-

RICHARD C. LABARTHE
MOCK, SCHWABE, WALDO, ELDER, REEVES & BRYANT
A Professional Corporation
Fifteenth Floor
One Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-5500
Fax: (405) 235-2875

Attorney General of Michigan
Frank J. Kelley
By his counsel:
FRANK J. KELLEY
Attorney General of Michigan
THOMAS L. CASEY
Michigan Solicitor General
KELLY G. KEENAN
Assistant Deputy Attorney General
The Law Building
Lansing, Michigan 48913
Telephone: (517) 335-1853
Fax: (517) 335-4213

The Oklahoma Corporation Commission
By its counsel:
LAWRENCE R. EDMISON
General Counsel
LESLIE WILSON PEPPER
Deputy General Counsel
Jim Thorpe Building
2101 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-2255
Fax: (405) 521-4150

Montana Public Service Commission
By its counsel:
MARTIN JACOBSON
Special Assistant Attorney General
State of Montana
1701 Prospect Avenue
P.O. Box 202601
Helena, Montana 59620
Telephone: (406) 444-6178
Fax: (406) 444-7618

Attorney General of Kansas
Carla Stovall
Kansas Corporation
Commission
By their counsel:
W. Robert Alderson
Special Assistant
Attorney General
John E. Jandera
Special Assistant
Attorney General
Alderson, Alderson &
Montgomery
2101 S.W. 21st Street
Topeka, Kansas 66604
Telephone: (913) 232-0753
Fax: (913) 232-1866

The International
Brotherhood of Teamsters
By its counsel:
Marc J. Fink
Torbjorn Sjogren
Sher & Blackwell
Suite 612, 2000 L Street,
N.W.
Washington, D.C. 20036
Telephone: (202) 463-2500
Fax: (202) 463-4950

(2)

Supreme Court, U.S.
FILED
APR 1 1996
CLERK

No. 95-1226

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANK J. KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL., PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
PETER R. MAIER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

16 pp

QUESTIONS PRESENTED

Section 601 of the Federal Aviation Administration Authorization Act of 1994 prohibits States from enacting or enforcing any law or regulation related to a price, route, or service with respect to the motor carriage of property. This case presents the following questions on the merits:

1. Whether Section 601, by preempting state laws governing the intrastate transportation of property by motor carrier, exceeds Congress's powers under the Commerce Clause of the United States Constitution.

2. Whether Section 601 violates the Tenth Amendment of the Constitution by encroaching on powers reserved to the States.

3. Whether Section 601 violates the Guarantee Clause of the Constitution by denying the States a republican form of government.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. *Wolens*, 115 S. Ct. 817 (1995)	8
Building & Trades Council v. *Associated Builders & Contractors*, 507 U.S. 218 (1993)	11
Freightliner v. *Myrick*, 115 S. Ct. 1483 (1995)	7
Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989)	11
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	10
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	10
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977)	8
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	10
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	9
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	10
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992)	8
New York v. *United States*, 505 U.S. 144 (1992)	11, 12
Perez v. *United States*, 402 U.S. 146 (1971)	10
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)	11
United States v. *Lopez*, 115 S. Ct. 1624 (1995)	6, 9, 10

Constitution and statutes:

U.S. Const.:	
Art. I, § 8:	
Cl. 3 (Commerce Clause)	4, 5, 6, 9

Constitution and statutes: Page

Cl. 18 6
Art. III 9
Art. IV, § 1 (Guarantee Clause) 4, 5, 7, 11, 12
Art. VI, Cl. 2 (Supremacy Clause) 7
Amend. X 4, 5, 6, 10, 11
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* ... 8
5 U.S.C. 702 8
5 U.S.C. 704 8
Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1605 1-2
§ 601, 108 Stat. 1605 ..... *passim*
§ 601(a)(1), 108 Stat. 1605 2
§ 601(b)(1), 108 Stat. 1605-1606 (to be codified at 49 U.S.C. 41713(b)) 3, 4
§ 601(c), 108 Stat. 1606 (49 U.S.C. 11501) 3-4

Miscellaneous:

H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. (1994) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1226

FRANK J. KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL., PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 69 F.3d 1503. The opinion of the district court (Pet. App. 19-43) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1995. The petition for a writ of certiorari was filed on January 31, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 601 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305,

108 Stat. 1605, took effect nationwide (except in Hawaii) on January 1, 1995. That provision preempts state regulation of prices, routes, or services of motor carriers engaged in the transportation of property. Section 601(a)(1) sets forth congressional findings that

> (1) the regulation of intrastate transportation of property by the States has —
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and
>
> (C) placed an unreasonable cost on the American consumers * * *

108 Stat. 1605. The Conference Report explains in greater detail Congress's determination that divergent State-by-State regulation of motor carrier operations causes significant "inefficiencies, increased costs, reduction of competition, [and] inhibition of innovation and technology," and "curtails the expansion of markets." H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 87 (1994). Congress also found that elimination of state-imposed economic regulation of motor carriers could result in annual savings in the range of $3 to 12 billion. *Ibid.*[*]

---

[*] The Conference Report explains that "[t]he sheer diversity of these regulatory schemes [wa]s a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 677, *supra*, at 87. For instance, evidence adduced at congressional hearings disclosed "numerous examples" where it cost more to ship goods within a State than to ship them a comparable distance between States. *Ibid.* In the small package business, "companies frequently ship[ped] goods across state lines and back

Section 601 includes separate preemption provisions for carriers affiliated with air carriers, and for motor carriers without such affiliations. Section 601(b)(1) amends 49 U.S.C. 41713(b) by adding the following paragraph:

> (4) TRANSPORTATION BY AIR CARRIER OR CARRIER AFFILIATED WITH A DIRECT AIR CARRIER. —
>
> (A) GENERAL RULE.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

108 Stat. 1605. Section 601(c) amends 49 U.S.C. 11501 by adding the following paragraph:

> (h) PREEMPTION OF STATE ECONOMIC REGULATION OF MOTOR CARRIERS. —
>
> (1) GENERAL RULE. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or

---

into the state of origin to avoid the higher rates for purely intrastate shipments." *Id.* at 87-88.

> service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.

108 Stat. 1606.

Section 601 preserves the authority of the States to regulate in traditional areas of state regulation, including highway safety. Thus, Section 601 makes clear that it "shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." § 601(b)(1), 108 Stat. 1605-1606; § 601(c), 108 Stat. 1606.

2. Petitioners filed suit in the United States District Court for the Western District of Oklahoma, contending that Section 601 exceeds Congress's authority under the Commerce Clause, and that it violates the Tenth Amendment and the Guarantee Clause of the Constitution. Following a trial on the merits, the district court dismissed the complaint and denied the requested injunctive and declaratory relief. Pet. App. 19-45. As an initial matter, the court held that, although Section 601's preemption provisions are self-executing and do not provide for any implementing or enforcement action by the Attorney General or other federal officials, petitioners were not barred by sovereign immunity principles from bringing this action against the United States and

the Attorney General for declaratory and injunctive relief. Pet. App. 21-32.

On the merits, however, the court rejected petitioners' claims. Pet. App. 33-42. Relying upon the legislative history of Section 601 and other evidence before it, the court concluded that "there is a rational basis for Congress's finding that the intrastate activity—state regulation of intrastate transportation of property—not only affects but unreasonably burdens interstate commerce." Pet. App. 38-39. The court also determined that the approach chosen by Congress—broad preemption of applicable state laws —is "reasonably adapted to an end permitted by the Constitution, the regulation of interstate commerce and elimination of burdens and impediments to commerce among the States." *Id.* at 40. In rejecting petitioners' Tenth Amendment challenge, the court observed that Section 601 "does not direct, coerce or even require the States to do anything," Pet. App 41-42, and it concluded that Section 601 therefore "does not intrude on the sovereignty reserved to the States by the Tenth Amendment," Pet. App. 42. Finally, the court rejected petitioners' argument under the Guarantee Clause, observing that "the fairly ordinary exercise of Congress' power under the Commerce Clause and power to completely preempt state law * * * cannot reasonably be said to deny any State a republican form of government." *Ibid.*

The court of appeals affirmed. Pet. App. 1-18. It held that the district court was authorized to entertain the suit, *id.* at 7-9, but rejected petitioners' claims on the merits, *id.* at 9-18. The court of appeals concluded that Section 601 constitutes a valid exercise of congressional authority under the Commerce Clause "[t]o regulate Commerce * * * among the

several States," Art. 1, § 8, Cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," Art. 1, § 8, Cl. 18. Pet. App. 9. The court observed that

> in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), the Supreme Court identified three broad categories of activity that Congress may regulate under the Commerce Clause: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities that substantially affect interstate commerce."

Pet. App. 9 (quoting *United States* v. *Lopez*, 115 S. Ct. 1624, 1629 (1995)). The court of appeals held that the activity addressed by Section 601—state regulation of intrastate motor carrier activities—"falls squarely within the third category of activity cited in *Lopez*." Pet. App. 9. In the court's view, "Congress rationally determined [that] the regulation of intrastate motor carrier activities, considered as a whole, does in fact impact and impede interstate commerce." *Id.* at 11. The court further determined that "the means chosen by Congress are reasonably adapted to the ends sought," *id.* at 12, explaining that the preemption of state regulations pertaining to prices, routes, and services of intrastate motor carriers "clearly serves to eliminate the 'patchwork' of varying state regulations that concerned Congress," *ibid.*

The court of appeals then addressed and rejected petitioners' claim under the Tenth Amendment. The court observed that "Congress may, under the Supremacy Clause, preempt an entire field of regulation and thereby deprive the states of any regulatory role." Pet. App. 15 (internal quotation marks

omitted). Here, it explained, "Congress has not compelled the states to voluntarily act by enacting or administering a federal regulatory program. Rather, Congress has simply imposed rules on the states via its Supremacy Clause powers." *Ibid.* Finally, the court rejected petitioners' contention that Section 601 violates the Guarantee Clause. Pet. App. 16-18. The court assumed without deciding that petitioners' claim was justiciable, but held it to be without merit, explaining that "Section 601 is a substantive constraint on the power of state governments to regulate interstate trucking, not a fundamental restructuring of the form of state governments." *Id.* at 18 (internal quotation marks omitted).

ARGUMENT

The court of appeals correctly rejected petitioners' constitutional claims on the merits. That decision is consistent with the rulings of this Court, and is not in conflict with any decision of another court of appeals. Further review is not warranted.

1. As an initial matter, we disagree with the conclusion by the courts below that the district court properly entertained this action against the United States and the Attorney General for broad declaratory and injunctive relief concerning the constitutionality of Section 601. The usual way in which preemption questions are resolved by the courts is through a suit brought by state officials or private individuals who seek to enforce state law; in such a suit, the defendant may then claim that the state law on which the plaintiff relies is invalid under the Supremacy Clause, Art. VI, Cl. 2, and therefore cannot be given effect by the courts. See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995);

American Airlines, Inc. v. *Wolens*, 115 S. Ct. 817 (1995). Alternatively, a person who is threatened by state officials with enforcement of a state law that the person believes is preempted by federal law may bring an action to enjoin the responsible state officials from doing so. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977). Petitioners, however, have not sought to enforce state law against regulated private parties, but have instead attempted to litigate the preemption issue with the federal government. There is no waiver of sovereign immunity that authorizes such an action.

Section 601 is self-executing in its effect on state laws; it neither provides for and nor requires any implementing or enforcement action by the Attorney General or other federal officials. As a result, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, furnishes no basis for suit, for the APA authorizes suits only to challenge final "agency action" of a federal agency. See 5 U.S.C. 704. Similarly, the express waiver of sovereign immunity in the APA applies only in a suit "stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. 702.

The district court and court of appeals nevertheless believed that sovereign immunity does not interpose a bar because petitioners seek to enjoin enforcement of an allegedly unconstitutional statute. Pet. App. 8-9, 24. But again, Section 601 assigns no enforcement role to the Attorney General or other federal official, and the courts below in any event pointed to no imminent threat of a suit by the Attorney General seeking to enjoin them from enforcing any state laws

that are preempted by Section 601. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Indeed, any injury that petitioners allege is traceable not to any action that might be taken by the Attorney General, but to Section 601 itself; and any such injury would not be redressed in this action, because a judgment against the Attorney General or the United States as a party would not preclude private persons who are not parties to this suit from relying on Section 601 in future litigation against petitioners or others. See *Defenders of Wildlife*, 504 U.S. at 560-561.

In addition, this suit, which is divorced from any particular application of state law that allegedly is inconsistent with Section 601, presents the preemption question in an abstract posture and raises numerous hypothetical issues regarding possible interpretations and applications of Section 601. See, *e.g.*, Pet. App. 12. Accordingly, even if Article III requirements were met, this would not be an appropriate case for the award of the equitable relief of an injunction or declaratory judgment invalidating Section 601.

2. Having reached the merits, however, the court of appeals properly rejected petitioners' facial challenge to Section 601, correctly concluding that that Section is a permissible exercise of Congress's powers under the Commerce Clause. This Court recently reaffirmed that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1629-1630 (citation omitted). As the court of appeals in the instant case recognized, "Congress made express findings,

set forth in subsection (a) of § 601, that state regulation of intrastate motor carrier activities substantially affects interstate commerce." Pet. App. 9-10. The court of appeals determined that those findings were rational, *id.* at 11, and that "the means chosen by Congress are reasonably adapted to the ends sought," *id.* at 12.

The court of appeals' analysis is fully consistent with this Court's precedents. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964). Indeed, petitioners do not contend that the court of appeals applied the wrong legal standard; they simply argue that the court misapplied that standard to the circumstances at hand. See Pet. 16-17. Petitioners' claim lacks merit and does not, in the absence of a circuit conflict regarding the constitutionality of Section 601, provide a basis for this Court's review.

The court of appeals also correctly rejected petitioners' contention that Section 601's broad preemption of state motor carriage regulation is improper because particular activities falling within the Section's coverage have no substantial effect on interstate commerce. "[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Lopez*, 115 S. Ct. at 1629 (emphasis omitted) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)); see also *Perez* v. *United States*, 402 U.S. 146, 154 (1971).

3. Petitioners' Tenth Amendment challenge to Section 601 is also without merit. Although "Congress may not simply 'commandee[r] the legislative

processes of the States by directly compelling them to enact and enforce a federal regulatory program,'" *New York* v. *United States*, 505 U.S. 144, 161 (1992), Congress has made no attempt to do that here. As the court of appeals recognized, Congress, in enacting Section 601, "has not compelled the states to voluntarily act by enacting or administering a federal regulatory program." Pet. App. 15. Rather, it has decided to "preempt an entire field of regulation and thereby deprive the states of any regulatory role." *Ibid.* (internal quotation marks omitted).

Petitioners acknowledge, as a general matter, that "Congress may, consistent with its authority under the Commerce Clause, preempt state regulation." Pet. 9. They contend, however, that Section 601 violates the Tenth Amendment because "Congress preempted state regulation of intrastate motor carriers, but it did not replace such regulation with federal standards." *Ibid.* That distinction is without constitutional significance. As this Court has repeatedly recognized, Congress may determine that certain spheres of private activity should be left "to be controlled by the free play of economic forces," *Building & Construction Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 225 (1993) (internal quotation marks omitted), and may act on that basis to preempt state regulation without substituting a federal regulatory regime. See, *e.g.*, *id.* at 225-226; *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 110-111 (1989); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

4. Finally, the court of appeals correctly rejected petitioners' claim under the Guarantee Clause. As that court recognized, "it is difficult to understand how § 601 could be construed in any way as affecting

the states' ability to structure their own governments as they see fit." Pet. App. 18. Compare *New York*, 505 U.S. at 186 (Court rejected Guarantee Clause claim because challenged provisions "do not pose any realistic risk of altering the form or the method of functioning of New York's government"). Where the preemption of state law is otherwise within Congress's power, the consequent displacement of state authority over private conduct cannot be held invalid on the ground that it denies the State a republican form of government. Thus, even assuming that petitioners' Guarantee Clause claim is justiciable, see *id.* at 184-186; Pet. App. 17-18, that claim is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
PETER R. MAIER
Attorneys

APRIL 1996

95-1226

No. 251226

Supreme Court, U.S.
FILED
APR 1 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

FRANK J. KELLEY, Attorney General of the State of Michigan; THE OKLAHOMA CORPORATION COMMISSION; THE MONTANA PUBLIC SERVICE COMMISSION; COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; CARLA STOVALL, Attorney General of the State of Kansas; and THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO Attorney General of the United States,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF UNITED PARCEL SERVICE, INC., IN SUPPORT OF RESPONDENTS

United Parcel Service, Inc.
By its counsel:
ELLIS ROSS ANDERSON*
EDWARD G. POOLE
ANDERSON, DONOVAN & POOLE, P.C.
601 California Street, Suite 1300
San Francisco, California 94108
Telephone: (415) 956-6413
Facsimile: (415) 965-6416

* Counsel of Record

28 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

REVIEW BY THE COURT IS NOT WARRANTED 3

A. Section 601 Does Not Exceed Congress' Authority Under The Commerce Clause 5

1. A Rational Basis Exists for Congress' Finding Of A Substantial Effect On Interstate Commerce 6

2. The Means Chosen By Congress Bear A Rational Relationship To Constitutionally Permitted Ends 10

B. Section 601 Does Not Violate The Tenth Amendment Of The United States Constitution 12

CONCLUSION 17

APPENDIX A A1

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts, 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) 13

FERC v. Mississippi, 462 U.S. 742, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982) 7, 13

Federal Express Corporation v. Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), cert. denied, 112 S.Ct. 2956 (1992) 15

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) 4, 5

Gibbons v. Ogden, 9 Wheat 1, 6 L. Ed 23 (1824) 3

Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) 2

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) 11

Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed. 2d 1, (1981) 5, 6, 10, 16, 17

Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964) 6

Kelley v. U.S., 69 F.3d 1503 (10th Cir. 1995) 2, 7

Machinists v. Wisconsin Emp. Rel. Comm'n, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976) 13

Maryland v. Wirtz, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968) 7

McCulloch v. Maryland, 4 Wheat 316, 4 L. Ed. 579 (1819) 12

National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) 4

New York v. United States, 402 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120, 137 (1992) 2, 5, 9, 12, 15

NLRB v. Nash-Finch Co. 404 U. S. 138, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971) 13

Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) 11

Perez v. United States, 402 US 146, 91 S. Ct. 1357, 28 L. Ed 2d 686 (1971) 5, 7

South Carolina v. Baker, 485 U.S. 505, 108 S. Ct. 1355, 99 L. 2d. 2d 592 (1988) 15

Swift & Co. v. United States, 196 U.S. 375, 25 S. Ct. 276, 49 L.Ed. 518 (1905) 8

United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) 4, 6, 7, 8, 15

Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) 4, 11

FEDERAL STATUTES AND REGULATIONS

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Title IV, 108 Stat. 1604, codified, as amended, at 49 U.S.C. §14501 . . . . . *passim*

ICC Termination Act of 1995, Pub. L. No. 104-88 14

49 U.S.C. Section 41713 16

OTHER

H.R. Conf. Rpt. No. 677, 103rd Cong., 2nd Sess. (1994), *reprinted in* 1994 U.S.C.C.A.N. 677 . . . . . 8, 9, 10, 11, 12, 14, 15, 16

The Federalist No. 51 (J. Madison) (Clinton Rossiter ed., 1961) 3

Powell, T. R., *The Still Small Voice of the Commerce Clause*, Selected Essays on Constitutional Law, 3 A.A.L.S. 931 (1938) 4

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

United Parcel Service, Inc., as *amicus curiae*, submits this brief in support of the brief in opposition filed by the Respondents, the United States of America, *ex. rel.* the Department of Justice and Janet Reno, Attorney General of the United States. UPS urges that Section 601 of Title VI of the Federal Aviation Administration Authorization Act of 1994, which became effective on January 1, 1995, be upheld as a valid exercise of Congress' commerce power.

INTEREST OF THE *AMICUS CURIAE*

United Parcel Service, Inc., (hereinafter "UPS") has authority to conduct intrastate operations in all fifty states, including authority issued by Petitioners Oklahoma Corporation Commission and Montana Public Service Commission. UPS is a wholly owned subsidiary of United Parcel Service of America, which also owns United Parcel Service Co., a certificated air carrier under Subchapter IV of the Federal Aviation Act of 1948 (49 U.S.C. §1371, as amended). Under the Federal Aviation Administration Authorization Act of 1994 (Pub. L. No. 103-305, Title VI, 108 Stat. 1604, codified, as amended, at 49 U.S.C. §14501) (hereinafter "Section 601") the states (except Hawaii), as of January 1, 1995, have been preempted from enacting or enforcing any law or regulation related to UPS's prices, routes or services.

SUMMARY OF ARGUMENT

Petitioners have requested a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit (*Kelley v. U.S.*, 69 F.3d 1503 (10th Cir. 1995) alleging Section 601: (1) violates the Tenth Amendment of the U.S. Constitution in that it compels state governments not to take legislative action, fails to offer states incentives not to enact legislation, and fails to provide a comprehensive federal scheme to replace state regulations; (2) violates the Commerce Clause of the Constitution in that no rational basis existed for Congress' actions and the means chosen were not reasonably adapted to constitutional ends; and, (3) violates the Guarantee Clause of the Constitution in that state officials are no longer accountable to their electorate. UPS submits this brief *amicus curiae* to assist the Court in considering select Commerce Clause and Tenth Amendment arguments. No argument is advanced in response to Petitioners' Guarantee Clause claims.

Inquiries under the Commerce Clause and the Tenth Amendment are mirror images in cases involving the division of authority between federal and state governments. *New York v. United States*, 402 U.S. 144, 156, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Thus, "even if [Petitioners] are correct in their assertions that §601 intrudes upon a domain traditionally left to the states, it is constitutional as long as it falls within the commerce power." *Kelley v. U.S.*, *supra*, at 1509; *Gregory v. Ashcroft*, 501

U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); *United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1630, 131 L. Ed. 2d 626 (1995)). The central issue, then, is whether Congress acted within its Commerce Clause power when it enacted Section 601. Under *United States v. Lopez* and other precedent of the Court, no room for doubt exists: Section 601 must be upheld as a proper exercise of Congress' commerce power. The Writ should not issue.

REVIEW BY THE COURT IS NOT WARRANTED

The early history of the Court developed from matters affecting interstate commerce, the subject now before the Court. The issue was of great importance to the founding fathers, and illustrates the critical interplay between the national government and the rights of the several states. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323 (Clinton Rossiter ed., 1961) (J. Madison). The decisions of the Court have shown the necessary analysis to be dynamic, respectful of the rights of the states, and sensitive to the predominant need for stability in matters of interstate commerce. *See, e.g., Gibbons v.*

Ogden, 9 Wheat 1, 189-190, 6 L. Ed 23 (1824); *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); *compare National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) *with Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). By denying the Petition for Writ of Certiorari, the Court will affirm these principles of federalism in the economic environment of today.

Petitioners suggest that Congress' exercise of its Commerce Clause power in enacting Section 601 presents a matter of first impression in that Congress preempted state regulation of intrastate motor carriers while preserving an inexplicably inconsistent set of rules for interstate carriers.[1] Petition for Writ of Certiorari (hereinafter "Petition"), at 6. This proffer is illusory. In this instance, Congress knowingly chose to preempt and not to regulate. No constitutional implications arise as a result. "Congress has the power to keep silent. Congress can regulate interstate commerce just by not doing anything about it." Powell, T. R., *The Still Small Voice of the Commerce Clause*, Selected Essays on Constitutional Law, 3 A.A.L.S. 931, 932 (1938). The decisions of the Court support Congress' affirmative silence.

---

[1] In fact, a review of federal regulation of interstate carriers during recent years discloses no meaningful control of "rates, routes and services" by the Interstate Commerce Commission. With the ICC Termination Act of 1995, any "inexplicable disparity" between the regulation of interstate and intrastate carriers effectively evaporates.

A. Section 601 Does Not Exceed Congress' Authority Under The Commerce Clause.

In determining whether sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the states, the inquiry can be one of whether an Act of Congress is authorized by one of the powers delegated to Congress in Article 1 of the Constitution (*Perez v. United States*, 402 US 146, 91 S. Ct. 1357, 28 L. Ed 2d 686 (1971)) or whether it invades the province of state sovereignty reserved by the Tenth Amendment (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)). UPS respectfully submits that the most logical and informative analysis is one that looks first at the scope of Congress' power under the Commerce Clause and then to whether the exercise of that power offends the prerogatives of the several states by "overstep[ping] the boundary between federal and state authority." *New York v. U.S.*, 505 U.S. 144, 159, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

Petitioners argue that under the two-part test of *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.* (452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed. 2d 1, (1981)), Section 601 fails to pass constitutional muster. Petition at 5. Under this test, if Congress finds that a regulated activity substantially affects interstate commerce, the Court must defer to Congress if there is any rational basis for such a finding. This established, the only

remaining question for judicial inquiry is whether the means chosen by Congress are reasonably adapted to the end permitted by the Constitution. *Hodel*, supra, 452 U.S. at 276. Section 601 survives inquiry under both parts of the test.

1. A Rational Basis Exists For Congress' Finding Of A Substantial Effect On Interstate Commerce.

Petitioners argue that the lower courts abdicated their responsibilities to review the basis of Congress' action by failing to carefully conduct an independent examination of the scope and effect of Section 601. Petition at 16. Petitioners are incorrect. In fact, they attempt to obscure the probative factual inquiry that occurred at both the trial and appellate levels in order to obtain a level of review not heretofore found to be appropriate by this or any federal court.

In *United States v. Lopez*, the Court announced that in instances when Congress seeks, under its commerce power, to regulate activities related to interstate commerce, the analysis to be conducted is whether the regulated activity "substantially affects" interstate commerce. ___ U.S. ___(638), 115 S. Ct. 1624, 1630, 131 L. Ed. 2d 626, 637 (1995). Even though the Court in *Lopez* noted that Congress need not make particularized findings in order to legislate (115 S. Ct. at 1631, citing *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964)), legislative findings and congressional committee findings regarding effect on

interstate commerce can be considered (*Lopez*, *supra*, 115 S. Ct. at 1631) and indeed weigh heavily in the analysis to be conducted. *See*, *Perez v. United States*, 402 US 146, 155, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) (the findings by Congress were found to be "quite adequate"). Upon review, the Court will rapidly determine that the findings of Congress in enacting Section 601 were thorough, knowledgeable, and more than adequate. *See*, *FERC v. Mississippi*, 462 U.S. 742, 759, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982). A deeper, independent examination into the breadth and scope of Section 601 that Petitioners suggest is not required for a constitutional imprimatur on Congress' action.[2]

Lopez is instructive to the Court's inquiry: "The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power." *Lopez*, *supra*, 115 S. Ct. at 1634 (Kennedy, J., concurring). Commerce among the

---

[2] The significance Petitioners attach to the language in the Tenth Circuit's decision to the effect that "there are undoubtedly various state regulations that effect and pertain only to purely intrastate motor carrier activities" (*Kelley v. U.S.*, 69 F.3d 1503, 1508 (10th Cir. 1995)) is in fact of no consequence. The Court has found that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *U. S. v. Lopez*, ___ U.S. ___, ___, 115 S. Ct. 1624, 1629, 131 L. Ed. 2d 626 (1995) (citing *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968)).

states is not a technical conception, but a practical one, drawn from the course of business (*Lopez*, *supra*, 115 S. Ct. at 1636 (Kennedy, J., concurring) citing *Swift & Co. v. United States*, 196 U.S. 375, 25 S. Ct. 276, 49 L.Ed. 518 (1905)).

The legislative history of Section 601 is replete with examples of the practical considerations, *drawn from the course of business*, upon which Congress based its decision to preempt state regulation. Congress found that continued state economic regulation of motor carrier operations would cause significant inefficiencies, increased costs, reduction of competition and inhibition of innovation and technology, and would curtail the expansion of markets. H.R. Conf. Rpt. No. 677, 103rd Cong., 2nd Sess. (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1759. Department of Transportation estimates found that preemption of state economic regulation could eventually yield $3 to $8 billion per year in savings, with other estimates placing the savings as high as $5 to $12 billion. *Id.* Congress recognized that the sheer diversity of various state regulatory schemes was a huge problem for national and regional carriers attempting to conduct the standard way of doing business. *Id.* The lower court noted that in hearings on Section 601, numerous examples were cited illustrating that rates for shipments within a state exceeded rates for comparable distances across state lines. Decision of the U.S. District Court, Western District of Oklahoma, December 30, 1994 (Appendix B to Petition at 39-40). The specific example of the

small package express business, like UPS, in which companies frequently shipped goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments was given. *Id.* Congress found that the lifting of these antiquated controls would permit transportation companies to freely compete more efficiently, to provide quality service to their customers, and to have service options dictated by the marketplace and not by an artificial regulatory structure. H.R. Conf. Rpt. No. 677, *supra*, at 1760.

These findings are not only detailed, but constitutionally sufficient and consistent with *stare decisis*. As the Court found in *New York*, the framework of the Constitution

> has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role. *New York*, *supra*, 505 U.S. at 157 (emphasis in original).

Congress' action in this instance exhibits nothing more than the prudent expansion of interstate commerce regulation within proper constitutional parameters. Petitioners assert that Section

601 has weakened the concept of Federalism embodied in the Constitution. Petition at 19. Precisely the opposite is the case. A valid exercise of the commerce power enhances the viability of the nation and the several states.

2. The Means Chosen By Congress Bear A Rational Relationship To Constitutionally Permitted Ends.

Once Congress determines that an activity substantially affects interstate commerce, the only remaining inquiry is whether the means chosen by Congress are reasonably adapted to a constitutional end. *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.* (452 U.S. 264, 276, 101 S.Ct. 2352, 69 L.Ed. 2d 1 (1981). Petitioners claim that because of the "blunderbuss" impact of Section 601 (Petition at 23), Congress acted irrationally in choosing preemption. An analysis of the record leads to the contrary conclusion: Congress' use of its Supremacy Clause powers was reasonably related to the goals Congress sought to accomplish.

Section 601 strikes an appropriate balance between the concerns of the citizens of the sovereign states and an exercise of federal power. Congress explicitly found that the need for Section 601 arose from a "patchwork of regulation" by the states. H.R. Conf. Rpt. No. 677, 103rd Cong., 2nd Sess. (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1759. Preemption is one of the more rational means at Congress' disposal when divergent regulatory

schemes of the rates, routes and services of motor carriers stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983). Congress properly found that preemption legislation was in the public interest as well as necessary to facilitate interstate commerce. H.R. Conf. Rpt. No. 677, *supra*, at 1759. The Court ought not to disturb this finding.

Through Section 601, Congress properly addresses economic activity of intrastate transportation by motor carrier, an area often found subject to federal regulation (*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942)) and not regarded as a matter of state concern.[3] Nonetheless, Congress was sensitive to state concerns that did not bear on the economic aspects of interstate commerce and in no way encroached upon them. For example, Congress left to the states the ability to regulate safety, to determine financial responsibility relating to insurance (H.R. Conf. Rpt. No. 677, *supra*, at 1756), and to require documentation evidencing carrier

---

[3] Petitioners assert that "the regulation of intrastate truck transportation has always been regarded as a matter of state concern." Petition at 19, n. 18. This argument is circular. The fact that some states may have imposed regulations has no bearing on whether the matters regulated are of peculiar and significant state concern.

compliance with state safety standards. H.R. Conf. Rpt. No. 677, *supra*, at 1757. While "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist" (*McCulloch v. Maryland*, 4 Wheat 316, 405, 4 L. Ed. 579 (1819), this case does not command any different answer to that question than previously articulated by the Court.

B. Section 601 Does Not Violate The Tenth Amendment Of The United States Constitution

Petitioners' lengthy discussion of *New York v. United States* ignores the fundamental difference between *New York* and the matter now before the Court. Specifically, Section 601 is preemptive legislation, which divests the states of the power to regulate in an area of activity wherein the authority of Congress is paramount, to wit, transportation affecting interstate commerce. *New York* and its progeny, by contrast, involve instances in which Congress elected not to preempt state activity, but rather attempted to compel the states to act affirmatively by promulgating and enforcing laws and regulations in furtherance of federal policy. The distinction is critical and dispositive.

The powers of Congress to preemptively bar the states from regulating (as opposed to mandating the states to regulate), have repeatedly been affirmed by the Court. *See, New York, supra*, 505 U.S. at 2420 (under the Supremacy Clause, Congress

could, if it wished, preempt state radioactive waste regulation) *and FERC v. Mississippi*, 462 U.S. 742, 759, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982) (Congress' exemption of qualified power facilities from state regulation does nothing more than preempt conflicting state enactments in the traditional way).

That Congress may replace state regulation with the "free play of economic forces" is not subject to question. *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976); *NLRB v. Nash-Finch Co.* 404 U. S. 138, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971). Section 601 on its face preempts state law. The Court has construed preemption to preclude "a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom ... or for ... [continued Federal] jurisdiction." *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218, 226-7, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) (emphasis added).

Petitioners insist that the failure of Congress to replace intrastate regulation with federal standards, provide for federal agencies to oversee the intrastate motor transportation of property, or carefully craft a uniform national regulatory scheme results in

infirm legislation. Petition at 9-10. The intimated unconstitutional "black hole" simply does not materialize.[4]

Congress' election not to occupy the field with federal regulation is consistent with the Court's broad construction of Congress' commerce power, respectful of the Tenth Amendment, and deferential to the framers of the Constitution. Congress found that continued intrastate regulation was "a huge problem for national and regional carriers attempting to conduct the standard way of doing business" and a "[l]ifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers." H.R. Conf. Rpt. No. 677, *supra*, at 1760. Congress was keenly aware that transportation, which by its very definition is dynamic and not static, has developed to the point where continued distinctions between "intrastate" and "interstate" impaired the development of a uniform system of commerce.

The Court has been equally cognizant. "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have

---

[4] Petitioners' position that Congress' continued regulation of interstate truck regulation reflects a continued judgment that regulation of interstate truck transportation remains vital (Petition at 12) is misplaced. It should be noted that the ICC Termination Act itself recodified the preemption provision of Section 601, thus clearly reflecting Congress' continuing intent to preempt state regulation. ICC Termination Act of 1995, Pub. L. No. 104-88. *See also*, note 1, *supra*, at 4.

accordingly come within the scope of Congress' commerce power." *New York*, *supra*, 505 U.S. at 158. To find Section 601 an invalid exercise of Congress' commerce power would, in the words of Justice Kennedy, damage both "the Court as an institution and the legal system as a whole [which] have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." *Lopez*, *supra*, 115 S. Ct. at 1637 (Kennedy, J., dissenting).[5]

Specific to the area of transportation, the courts have recently held that Congress has the right to preempt state regulation and replace it with nothing if it so desires. *Federal Express Corporation v. Public Utilities Commission* (936 F.2d 1075, 1079, (9th Cir. 1991), *cert. denied*, 112 S.Ct. 2956 (1992). That case, to which the genesis of Section 601 can be traced (H.R. Conf. Rpt. No. 677, *supra*, at 1759), confirms that a state may properly be preempted from regulating intrastate motor carrier rates, routes and services, even in areas over which Congress elected not to impose specific economic rules. In addition, the Airline Deregulation Act, which Petitioners have not challenged as a valid exercise of Congress' preemptive powers, is identical to Section 601 in its

---

[5] Petitioners invite damage to the Court as an institution and to the separation of powers of the three branches of government. As this Court stated in *South Carolina v. Baker*, "[n]othing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation." 485 U.S. 505, 513, 108 S. Ct. 1355, 99 L. 2d. 2d 592 (1988).

method of prohibiting states from enacting or enforcing laws, regulations or provisions related to "price, route, or service." 49 U.S.C. Section 41713, formerly 49 U.S.C. Section 1305(a). As to Section 601, Congress speaks clearly to the subject: "The central purpose of this legislation is to extend to all affected carriers. . .the identical intrastate preemption of prices, routes and services as that originally contained in Section 105(a), 49 U.S.C. App. 1305(a)(1), of the Federal Aviation Act." H.R. Conf. Rpt. No. 677, *supra*, at 1755.

Finally, in enacting Section 601, Congress has not regulated the states *as states* as Petitioners allege. Petition at 11. The same argument was raised and rejected in *Hodel v. Virginia Surface Mining and Reclamation Association*. There, the aggrieved coal producers and state governments urged that the federal usurpation of their regulatory roles coerced the states, regulated the states as states and impinged upon the states' freedom to make decisions in areas of "integral governmental functions." 452 U.S. 264, 289, 101 S.Ct. 2352, 69 L.Ed. 2d 1 (1981). In response, the Court held that although congressional enactments such as the Surface Mining Control and Reclamation Act "obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Hodel*, *supra*, 452 U.S. at 290. In *Hodel*, the Court found that "Congress could constitutionally have enacted a statute prohibiting any state

regulation of surface coal mining" (*Id.*, emphasis added) without invading areas reserved to the states by the Tenth Amendment. The Court should reach the same conclusion here.

CONCLUSION

Section 601 represents a proper exercise of Congress' commerce power that does not invade an area reserved to the states by the Tenth Amendment. Congress, in articulate and reasoned findings, made the determination that continued intrastate economic regulation of transportation by motor carrier had a substantial and debilitating effect on interstate commerce. Congress chose to preempt the field, a rational and appropriate means at its disposal to reach a permitted constitutional end. These actions do not offend any precedent of the Court and are consistent with the Constitution.

Respectfully submitted,

United Parcel Service, Inc.
By its counsel:
ELLIS ROSS ANDERSON*
EDWARD G. POOLE
ANDERSON, DONOVAN &
POOLE, P.C.
601 California Street, Suite 1300
San Francisco, California 94108
Telephone: (415) 956-6413
Facsimile: (415) 956-6416

*Counsel of Record

APPENDIX A

WRITTEN CONSENTS TO FILING

SHER & BLACKWELL
ATTORNEYS AT LAW
SUITE 612
2000 L STREET, N.W.
WASHINGTON, D.C. 20036

TELEPHONE (202) 463-2500
FACSIMILE (202) 463-4950/7840

WRITER'S DIRECT DIAL NO.
(202) 463-2509

March 12, 1996

Via Facsimile and First Class Mail

Mr. Edward G. Poole, Esq.
Anderson, Donovan & Poole
601 California Street
Suite 1300
San Francisco, CA 94108-2818

Re: Kelley v. United States, Petition for Writ of Certiorari, Supreme Court No. 95-1226

Dear Mr. Poole:

In response to your letter dated March 6, 1996 and in accordance with Supreme Court rule 37, the International Brotherhood of Teamsters hereby consents to United Parcel Service filing an amicus curiae brief in the above-referenced proceeding.

If you have any questions regarding the above please contact me at the above-referenced number.

Sincerely,

T. SJÖGREN

Marc J. Fink
Torbjörn Sjögren
Counsel to the International
Brotherhood of Teamsters

FOSTER, SWIFT,
COLLINS & SMITH, P.C.
ATTORNEYS AT LAW

ROBERT E. McFARLAND

Offices in:
Lansing
Farmington Hills

32300 Northwestern Highway
Suite 230
Farmington Hills, MI 48334-1571
Phone (810) 538-9901
Fax (810) 851-7504

March 18, 1996

RECEIVED MAR 22, 1996, ANDERSON, DONOVAN & POOLE

Mr. Edward Poole
Anderson, Donovan & Poole
601 California Street
Suite 1300
San Francisco, CA 94108-2818

Re: *Kelley, et al.* v. *United States, et al.*,
United States Supreme Court
No. 95-1226

Dear Mr. Poole:

I wish to confirm our telephone conversation of Thursday, March 14, 1996, in which I indicated consent to the filing of an *amicus curiae* brief by United Parcel Service, Inc. on behalf of the Respondents in the above-referenced case, presently pending on Petition for Writ of Certiorari before the United States Supreme Court. I indicated consent on behalf of the Coalition Against Federal Preemption of State Motor Carrier Regulation, Attorney General of Michigan Frank J. Kelley, the Oklahoma Corporation Commission, Attorney General of Kansas Carla Stovall, and the Kansas Corporation Commission. It is my understanding that you have previously been given consent by Petitioners Montana

Public Service Commission and the International Brotherhood of Teamsters in separate correspondence.

Please advise if there are any questions.

Very truly yours,

ROBERT E. McFARLAND

Robert E. McFarland

REM/lj

cc: Mr. Kelly G. Keenan
Mr. Lawrence R. Edmison
Mr. Martin Jacobson
Mr. W. Robert Alderson
Mr. Marc J. Fink
Mr. Richard C. Labarthe
Mr. Peter Maier

PUBLIC SERVICE COMMISSION
STATE OF MONTANA

Nancy McCaffree, Chair
Dave Fisher, Vice Chair
Bob Anderson
Danny Oberg
Bob Rowe

[SEAL]

1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601
Telephone: (406) 444-7618
FAX: (406) 444-6199
Compuserve: 70642,1607

RECEIVED MAR 11
1996 ANDERSON,
DONOVAN & POOLE

March 7, 1996

Edward G. Poole
Anderson, Donovan, and Poole
601 California St., Suite 1300
San Francisco, CA 94108-2818

Dear Mr. Poole:

In response to your March 6, 1996 request regarding *Kelley v. U.S.*, U.S. Supreme Ct. No. 951226, the Montana Public Service Commission consent to your client's, United Parcel Service, Inc., filing of a brief *amicus curiae* in support of the Department of Justice.

Sincerely,

MARTIN JACOBSON

Martin Jacobson
Staff Attorney

MJ/dlp

[SEAL]

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

March 25, 1996

Edward G. Poole
Law Offices of Anderson,
Donovan & Poole
601 California Street
Suite 1300
San Francisco, CA 94108

Re: Kelley v. United States
No. 95-1226

Dear Mr. Poole:

As requested in your letter of March 6, 1996, I hereby consent to the filing of a brief *amicus curiae* on behalf of the United Parcel Service, Inc., in support of the respondent in the above-styled case.

Sincerely,

DREW S. DAYS, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 205431

(4)

No. 95-1226

Supreme Court, U.S.
FILED
APR 24 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

FRANK J. KELLEY, Attorney General of the State of Michigan; THE OKLAHOMA CORPORATION COMMISSION; THE MONTANA PUBLIC SERVICE COMMISSION; COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; CARLA STOVALL, Attorney General of the State of Kansas; and THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO, Attorney General of the United States,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS AND AMICUS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION
By its counsel:
ROBERT E. MCFARLAND*
JENNIFER A. HAY
FOSTER, SWIFT, COLLINS & SMITH, P.C.
32300 Northwestern Hwy., Ste. 230
Farmington Hills, Michigan 48334
Telephone: (810) 851-7500
Fax: (810) 851-7504

*Counsel of Record

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

224

-and-

RICHARD C. LABARTHE
MOCK, SCHWABE, WALDO, ELDER, REEVES & BRYANT
A Professional Corporation
Fifteenth Floor
One Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-5500
Fax: (405) 235-2875

ATTORNEY GENERAL OF MICHIGAN
FRANK J. KELLEY
By his counsel:
FRANK J. KELLEY
Attorney General of Michigan
THOMAS L. CASEY
Michigan Solicitor General
KELLY G. KEENAN
Assistant Deputy Attorney General
The Law Building
Lansing, Michigan 48913
Telephone: (517) 335-1853
Fax: (517) 335-4213

ATTORNEY GENERAL OF KANSAS
CARLA STOVALL
KANSAS CORPORATION COMMISSION
By their counsel:
W. ROBERT ALDERSON
Special Assistant Attorney General
JOHN E. JANDERA
Special Assistant Attorney General
ALDERSON, ALDERSON & MONTGOMERY
2101 S.W. 21st Street
Topeka, Kansas 66604
Telephone: (913) 232-0753
Fax: (913) 232-1866

THE OKLAHOMA CORPORATION COMMISSION
By its counsel:
LAWRENCE R. EDMISON
General Counsel
LESLIE WILSON PEPPER
Deputy General Counsel
JIM THORPE BUILDING
2101 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-2255
Fax: (405) 521-4150

MONTANA PUBLIC SERVICE COMMISSION
By its counsel:
MARTIN JACOBSON
Special Assistant Attorney General
State of Montana
1701 Prospect Avenue
P.O. Box 202601
Helena, Montana 59620
Telephone: (406) 444-6178
Fax: (406) 444-7618

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
By its counsel:
MARC J. FINK
TORBJORN SJOGREN
SHER & BLACKWELL
Suite 612, 2000 L Street, N.W.
Washington, D.C. 20036
Telephone: (202) 463-2500
Fax: (202) 463-4950

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS AND AMICUS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

A. Sovereign Immunity Is Not A Bar To Constitutional Review Of Section 601 1

B. The Preemptive Disguise of Section 601 Does Not Save It From Being Violative Of The Tenth Amendment 3

C. Section 601 Is Not A Constitutionally Permissible Exercise Of Authority Under the Commerce Clause 7

D. In Encroaching On State Sovereignty, Section 601 Also Offends The Guarantee Clause 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES
FEDERAL

American Airlines v. Wolens, 513 U.S. ___, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) 3, 9

Barbier Truck Service, Inc., et al. v. United States, et al., Case No. 94-CV-989-WDS 2

Carter v. Seamans, 411 F. 2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970) 1

Dugan v. Rank, 372 U.S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963) 1

Federal Express Corporation v. California Public Utilities Commission, 936 F. 2d 1075 (9th Cir. 1991) *cert. denied*, 504 U.S. 979 (1992) 8

FERC v. Mississippi, 456 U.S. 742, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982) 7

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) 7

Garcia v. United States, 538 F. Supp. 814 (S.D. Tex. 1982) 1

Gibbons v. Ogden, 9 Wheat 1, 196, 6 L. Ed. 23 (1824) ... 7, 8

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) 7

Hodel v. Virginia Surface Mining and Reclamation Associates, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981) 7, 8, 9, 10

Katzenbach v. McClung, 379 U.S. 305, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964) 7

TABLE OF AUTHORITIES – Continued

Page

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), *reh'g denied*, 338 U.S. 840 (1949) 1

Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) 3

Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976) 4

Maryland v. Wirtz, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968) 7, 8

Morales v. TransWorld Airlines, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) 3, 9

Neal v. Secretary of Navy, 472 F. Supp. 763 (E.D. Pa. 1979), *rev'd on other grounds*, 639 F. 2d 1029 (3d Cir. 1981) 2

New York v. United States, 402 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) 3, 6, 10

Perez v. United States, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) 7

Seltzer v. Foley, 502 F. Supp. 600 (S.D. N.Y. 1980) 2

Tenneco Oil Co. v. Sac and Fox Tribe of Indians, 725 F. 2d 572 (10th Cir. 1984) 1

United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) 7, 8, 9

Weeks v. United States, 406 F. Supp. 1309 (W.D. Okla. 1975), *rev'd on other grounds*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977) 2

Wickard v. Filburn, 317 U.S. 111, 125, 63 S. Ct. 82, 87 L. Ed. 122 (1942) 7

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS/STATUTES
FEDERAL

Commerce Clause, U.S. Const., Art. I, Sec. 8, cl. 3 ..... 7, 8, 9

Federal Aviation Administration Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1604, codified, as amended, at 49 U.S.C. § 14501 ..... *passim*

ICC Termination Act of 1995, Pub. L. No. 104-88 4

49 U.S.C. § 11703 2

49 U.S.C. § 13708 5

49 U.S.C. § 14101(c) 6

49 U.S.C. § 14501 4

49 U.S.C. § 14706 5

49 U.S.C. § 46106 ..... 2, 5

49 U.S.C. § 46107 2

OTHER

1 Jeremy C. Moore, et al., *Moore's Federal Practice* ¶ 300.03[6] (1994) 1

H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess., at 87, *reprinted in* 1994 U.S.C.C.A.N. 1759 8

PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS AND AMICUS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. Sovereign Immunity Is Not A Bar To Constitutional Review Of Section 601.

Respondents in opposition to the petition first attack the lower courts' decision to review the merits of Petitioners' action for declaratory and injunctive relief. (Brief for the Respondents in Opposition, hereinafter "Resp. ___," at 7-9). Respondents again argue that Section 601 is shielded from constitutional scrutiny by the doctrine of sovereign immunity. (Resp. 7-9). This argument has no merit. It was properly rejected by both the court of appeals and the district court. (Appendix to Petition for Writ of Certiorari, hereinafter "Pet. ___," or "Pet. App. ___," at 7-9 and 21-24).

As Petitioners explained below, the sovereign immunity doctrine does not apply to suits seeking declaratory or injunctive relief.[1] Moreover, there is no sovereign immunity against a suit which seeks relief from action or threatened action of an unconstitutional nature by an official of the federal government, i.e., the Attorney General, or a federal agency. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), *reh'g denied*, 338 U.S. 840 (1949).

Federal courts have routinely applied the rule stated in *Larson* to permit parties to maintain suits which seek to enjoin action or threatened action by a federal officer under an unconstitutional statute. *See, e.g., Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984); *Carter v. Seamans*, 411 F.2d 767, 770-71 (5th Cir. 1969), *cert.*

---

[1] *See also* 1 Jeremy C. Moore, et al., *Moore's Federal Practice* ¶ 300.03[6], ("Because suits seeking declaratory or injunctive relief do not involve recoveries from the federal treasury, injunctive or declaratory relief may be had against the federal officials for their alleged unconstitutional or otherwise unlawful conduct, without impinging on the sovereign immunity of the United States."). *Cf. Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); and *Garcia v. United States*, 538 F. Supp. 814, 816 (S.D. Tex. 1982).

denied, 397 U.S. 941 (1970); *Seltzer v. Foley*, 502 F. Supp. 600, 601 (S.D. N.Y. 1980); *Neal v. Secretary of Navy*, 472 F. Supp. 763, 770-71 (E.D. Pa. 1979), *rev'd on other grounds*, 639 F.2d 1029 (3d Cir. 1981); *Weeks v. United States*, 406 F. Supp. 1309, 1325 (W.D. Okla. 1975), *rev'd on other grounds*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977).

Respondents again argue, as they did below, that Section 601 provides for no implementation nor enforcement action by the Attorney General. (Resp. 8-9). However, Respondents acknowledged in a still-pending parallel challenge to Section 601 in *Barbier Truck Service, Inc., et al. v. United States, et al.*, Case No. 94-CV-989-WDS that:

> Upon further consideration and analysis, defendants [the United States of American, ex rel. the Department of Justice and Janet Reno, Attorney General of the United States] have concluded that through other statutory authority they possess residual authority to enforce Section 601.[2]

(Defendants' Supplemental Statement with Respect to Jurisdiction, p. 1, App. AA at 2).[3] Accordingly, far from being powerless, the Department of Justice there conceded that it is a federal agency with very real powers to enforce Section 601. Where a facial constitutional challenge of a declaratory judgment nature is brought against the United States, and its officers and agencies, sovereign immunity does not obtain.

Respondents also attempt to resurrect their standing argument[4] directly contradicting their Supplemental Statement in *Barbier*, *supra*, where they conceded:

---

[2] Although the district court in *Barbier* denied Plaintiff's Motion for Preliminary Injunction on August 8, 1995, it has not yet proceeded to trial. The court in *Barbier* also rejected Defendants' sovereign immunity and standing arguments.

[3] Defendants in *Barbier* acknowledged that such residual authority resides in 49 U.S.C. §§ 46106, 46107 and 11703 (now § 14703). (*Id.*, at 2, App. AA at 2).

[4] Respondents argued standing before the district court, but not at the court of appeals level.

> Defendants recede from their position plaintiffs lack standing because of an injury fairly traceable to defendants' conduct.

(App. at 2). The district court in this proceeding carefully analyzed and rejected Respondents' standing assertions. (Pet. App. 24-32).

There is standing in this proceeding on behalf of all Petitioners fully consistent with *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Petitioners' injuries are fairly traceable to Respondents' conduct. Neither are the injuries asserted hypothetical. The meaning of Section 601 has been made evident by this Court's decisions in *American Airlines v. Wolens*, 513 U.S. ___, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) and *Morales v. Trans-World Airlines*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). (Pet. 23-24), thereby confirming that the scope of intrastate preemption will be dramatically restrictive. An injunction against Respondents and a declaratory judgment invalidating Section 601 will confer relief on Petitioners.

B. The Preemptive Disguise Of Section 601 Does Not Save It From Being Violative of the Tenth Amendment.

As Congress did not compel the states to enact and enforce a federal regulatory program, but, instead, merely prohibited all motor carrier (and air carrier affiliate) intrastate regulation related to price, route, or service, Respondents and Amicus United Parcel Service, Inc. (UPS) contend that Section 601 is immune from Tenth Amendment attack. (Resp. 10-11; Brief *Amicus* Curiae of United Parcel Service, Inc., in support of Respondents, hereinafter "UPS ___," at 12-17). They maintain that Section 601 is only a preemption, which Congress is authorized to do and, accordingly, is distinguishable from the defective statute examined by this Court in *New York v. United States*, 402 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Respondents and UPS are in error. The reasoning of the *New York* Court is directly applicable to this

Section 601 prohibition, which is tantamount to a compulsion. The lower court decision stands contrary to *New York*.

In the first instance, Section 601 is not a true preemption. It does not fill a field with federal regulation. It does not impose a unified federal-state regulatory scheme. It does not determine that there shall be no federal or state motor carrier regulation. Rather than create consistency of regulation, it perpetuates "a patchwork," through a federal system of rules and controls for interstate carriers and a regulatory vacuum for intrastate carriers (and a vacuum as well for the intrastate side of the operations of carriers that engage in interstate transportation).

UPS is wrong when it proclaims that the ICC Termination Act of 1995 (hereinafter "ICCTA") "effectively evaporates" any disparities between federal regulation and the state regulatory void.[5] Notwithstanding the contentions of UPS (UPS 14 n.4), Congress reaffirmed its judgment that federal regulation was required in certain areas of *interstate* motor transportation, through the passage of ICCTA, that transferred most remaining transportation functions to a newly created Surface Transportation Board and the U.S. Department of Transportation. At the same time, Congress continued the irrational two-tiered level of regulation, by recodifying the Section 601 preemption (the motor carrier portion) at 49 U.S.C. § 14501.[6]

The two-tiered framework of regulation (i.e., regulation for interstate shipments and non-regulation for intrastate shipments) is not part of a unified national system of regulation, where market forces in certain areas are allowed to play out on both a state and national level as was the case in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976). (*See* Pet. 14 n.14). The contentions of Respondent and UPS on this point are meritless.

---

[5] See Pet. 12 n.12, for a listing of some of the motor carrier regulatory strictures of ICCTA applicable to *interstate* motor carriers.

[6] *See* Pet. 2 & n.3, 3 & n.4-5.

The bi-level regulatory playing field left by Section 601 does have important consequences for the Tenth Amendment analysis, also. For example, Congress has left in place the full liability standard for loss and damage of interstate shipments, absent written agreement of the carrier and shipper, at 49 U.S.C. § 14706. Likewise, a "truth-in-billing" requirement exists on interstate shipments, pursuant to 49 U.S.C. § 13708. No such requirements exist for shipments in intrastate commerce, however. No federal agency regulates such intrastate activities. THE STATES ARE PROHIBITED BY SECTION 601 FROM REGULATING SUCH SHIPMENTS, EVEN IN A FASHION IDENTICAL TO FEDERAL REGULATION.

The citizenry will hold the states accountable for failing to regulate, not the federal government. While the federal government has protected shippers and receivers from unscrupulous, irresponsible or careless motor carriers with regard to billing and cargo loss, it has precluded states from taking the same action. It will be the local units of government which will be blamed for the lack of corresponding consumer protection *at the local level*. This is why the distinction of this unique form of preemption does have constitutional significance, contrary to Respondents' protestations. (Resp. 11).

Justice O'Connor's dissenting opinion, in *FERC*, *supra*, 72 L. Ed. 2d at 564, is instructive on this issue:

> When Congress preempts a field, *it precludes only state legislation that conflicts with the national approach*. (emphasis supplied).

Congress only occupies a field in such a way that there can be no state regulation "in rare instances." *Id.* at 564 n.18. As to the offensiveness of compulsion, Justice O'Connor wrote:

> Local citizens hold their utility commissioners accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike preemption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs. *Id.*

These are the same concerns as were expressed by the Court in *New York*, *supra*, 112 S. Ct. at 2424. In like fashion, the Section 601 prohibition, coupled with the two tiers of regulation, has the same practical effects as a compulsion, in undermining the Constitutional principle of federalism.

Because of the enactment of Section 601, the states can no longer serve as legislative laboratories. Michigan cannot fine tune its motor carrier legislation to meet its electorate's changing needs as it had in 1982 and 1993 (after extensive hearings held around the state and detailed legislative scrutiny); Montana cannot require that intrastate common carriers provide adequate service on reasonable request, as is still required at the federal level (*see* 49 U.S.C. § 14101(c)); Kansas cannot apply its state statutory standard for cargo loss and liability; and Oklahoma cannot supervise the oilfield operations of its saltwater carriers. Similarly, the other 36 states (all save Hawaii, exempted from the preemption) which economically regulated their intrastate motor carrier industries are bereft of their ability to remain responsible to their electorate. Further, the remaining states which never regulated truck transportation economically (two states), or determined, *through their own legislative processes*, to end economic regulation (seven states), stand to see existing laws preempted on matters as diverse as consumer protection, antitrust, bills of lading, Article VII of the Uniform Commercial Code, and carrier liability for shipment loss and damage.

This prohibition has the same effect as a compulsion. If citizens do not retain the power to govern their local problems, the lessons of self-government will be lost. *Id.* at 566-567. As in *New York*, *supra*, 112 S. Ct. at 2424, "the accountability of both state and federal officials is diminished" through the Section 601 command not to govern. The negative "freedom" that is the Section 601 prohibition impinges on state sovereignty in exactly the same manner as does a compulsion. It should not be allowed to stand.

C. Section 601 Is Not A Constitutionally Permissible Exercise Of Authority Under The Commerce Clause.

Respondents and UPS argue that Section 601 is a constitutionally unremarkable exercise of congressional Commerce Clause authority, consistent with this Court's precedents. If this Court's precedents are taken to mean that congressional authority under the Commerce Clause is limitless, then Section 601 is unremarkable.

However, the Supreme Court precedents, as this Court recently restated in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1626-1627, 131 L.Ed.2d 626 (1995), establish that the Commerce Clause has defined boundaries.[7] Section 601

---

[7] "In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); "The power of Congress in this field is broad and sweeping; *where it keeps within its sphere and violates no express constitutional limitation* it has been the rule of this Court . . . not to interfere." *Katzenbach v. McClung*, 379 U.S. 305, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964) (emphasis supplied); "This Court has always recognized that the power to regulate commerce, while broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), "Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress *if it exerts a substantial effect on interstate commerce. . . .* " *Perez v. United States*, 402 U.S. 146, 151-152, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) (emphasis supplied), quoting *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S. Ct. 82, 87 L. Ed. 122 (1942); "This power acknowledges no limitations, *other than are prescribed in the Constitution.*" *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1, 16 (1981) (emphasis supplied), quoting *Gibbons v. Ogden*, 9 Wheat 1, 196, 6 L. Ed. 23 (1824); "Thus, it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited." *Hodel, supra,* 38 (Rehnquist, J. concurring); "The propriety of this type of legislation – *so long as it is a valid exercise of the commerce power. . . .*," *FERC v. Mississippi*, 462 U.S. 742, 102 S. Ct. 2126, 72 L. Ed. 2d 532, 547 (1982) (emphasis supplied); "Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016, 1037 (1985); and "The *Gibbons* Court . . . acknowledged that limitations on the commerce power

does not stand scrutiny under the *Hodel* test. *Hodel* cannot be misapplied to such an extent that it becomes meaningless.

Contrary to the contentions of Respondents and UPS, this Court is not required to follow lockstep an unfounded congressional conclusion that preempted activities have a substantial effect on interstate commerce. *Wirtz*, *supra*, 392 U.S. at 198, and *Hodel*, *supra*, 452 U.S. at 311 (Rehnquist, J., concurring). Congress candidly acknowledged that the genesis of Section 601 grew out of disparate regulatory treatment by some states of large package delivery carriers (including Federal Express Corporation, UPS, and Roadway Package Express) in the wake of a holding by the United States Court of Appeals for the Ninth Circuit in *Federal Express Corporation v. California Public Utilities Commission*, 936 F. 2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992). H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess., at 87, *reprinted in*, 1994 U.S.C.C.A.N. at 1759.[8] There was no Congressional consideration of whether the local transportation of disabled vehicles or saltwater brine or recyclable materials or gravel or the local relocation of used office furnishings have a substantial effect on interstate commerce. The congressional action in enacting Section 601 did not consider these activities, because they were outside of the congressional focus on package carriers at the time, but not outside the scope, unfortunately, of the overbroad legislative solution.

Further, such truck activities have importance to local economies, and have been deemed worthy of regulation by local and state governments in a variety of respects, all ended

---

are inherent in the very language of the Commerce Clause. . . . 'Comprehensive as the word [among] is, it may very properly be restricted to that commerce which concerns more States than one.' " *Lopez*, *supra* 115 S. Ct. 1624, 1626, quoting *Gibbons*, *supra*, 9 Wheat 1, 194-195.

[8] The court of appeals in *Federal Express* did not, as UPS suggests, find constitutional the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-405, 92 Stat. 1707. Neither does the ADA, as UPS contends, preempt air regulation in the same fashion as Section 601. Rather, the ADA assigned the responsibility of regulating intrastate air transportation to the Federal Aviation Administration (and its predecessor Civil Aeronautics Board). (*See also* Pet. 22 n.21).

by Section 601. It is not proper to term these activities "*de minimis*," as Respondents and UPS do. (Resp. 10; UPS 7). For example, the application of state or local consumer protection laws to unscrupulous tow-truck operators (now limited to "non-consensual" tows) is not unimportant to either the affected consumer or governmental unit.

Section 601 does not satisfy the second part of the *Hodel* test either, in that a reasonable relationship does not exist between the selected means and the permitted end of the preemption provision. The meaning of Section 601 is clear, after this Court's decisions in *Wolens*, and *Morales*, *supra*. All "related" state-imposed regulations fall. It is not limited to state economic regulatory statutes. That the states were left with the trappings of certain minimum safety regulatory responsibilities does not change the fact that the means selected in this vast-encompassing preemptive sweep were unreasonable.

Respondents and UPS not surprisingly take solace in *Lopez*, as it was also relied upon heavily by the court of appeals below in finding Section 601 to be within the scope of Commerce Clause power. (Resp. 9-10; UPS 3, 6-8). However, this Court in *Lopez did not* state that all commercial activities necessarily fall within the scope of Congress' Commerce Clause power. The Court did evince a concern for Congress to distinguish "between what is truly national and what is truly local." *Id.* at 1634. The Court referred to "move[ment] in interstate commerce" and a "concrete tie to interstate commerce" as non-existent factors in *Lopez*. *Id.*

Section 601 was not limited to shipments moving in interstate commerce, carriers engaging in interstate commerce, or carriers with concrete ties to interstate commerce. It does not distinguish between what is truly national and truly local. Therein lies another constitutional flaw.

D. In Encroaching On State Sovereignty, Section 601 Also Offends the Guarantee Clause.

Respondents contend that the court below correctly rejected Petitioners' Guarantee Clause claim, as Section 601

does not alter the form or structure of the states' form of government. (Resp. 11-12). However, *New York*, *supra*, 112 S. Ct. at 2433, in its Guarantee Clause analysis, was not so narrow. The *New York* Court referred to the continued ability of the states in that case to set their own legislative agendas, and to remain accountable to their electorates. The Section 601 prohibition, in failing to impose upon the states the federal interstate system of regulation, and creating an intrastate regulatory void, has just the opposite effect. The states cannot set their own legislative agendas vis-a-vis their own local problems. They cannot remain responsible to their electorates. See the discussion at 5, 6, 9, *supra*. The Guarantee Clause is also violated.

CONCLUSION

In order to address the conflict between the court of appeals' decision and both *Hodel* and *New York*, and to resolve the vital federal questions raised by the lower courts' determination of Section 601's constitutionality, the petition for a writ of certiorari should be granted.

Respectfully submitted,[9]

THE COALITION AGAINST FEDERAL PREEMPTION OF STATE MOTOR CARRIER REGULATION
By its counsel:
ROBERT E. MCFARLAND*
JENNIFER A. HAY
FOSTER, SWIFT, COLLINS & SMITH, P.C.
32300 Northwestern Hwy., Ste. 230
Farmington Hills, Michigan 48334
Telephone: (810) 851-7500

*Counsel of Record

---

[9] See Appendix BB for the names of the additional parties and their counsel jointly submitting this Reply Brief.

APPENDIX AA

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

BARBIER TRUCK SERVICE, INC., PAUL JOHNSON, INC., J-M TRANSPORTS, INC., L & E CARTAGE COMPANY, LOTS TRUCKING, INC., MAYFIELD TRANSFER CO., GARY L. McKAY AND GLENN L. McKAY, d/b/a McKAY TRUCKING, PEET FRATE LINE, INC., FRATE SERVICE, INC., CBA TRUCKING COMPANY, RUDOLF EXPRESS CO., R.L. NEHLS TRANSFER, INC. AND MACK AND RIGGLE, INC., Plaintiffs, vs. THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO, Attorney General of the United States, Defendants.	Case No. 94-CV-989-WDS

DEFENDANTS' SUPPLEMENTAL STATEMENT WITH RESPECT TO JURISDICTION

In Defendants' Memorandum in Support of their Motion to Dismiss, defendants challenged plaintiffs'

standing with respect to both their failure to allege a concrete and imminent injury and their failure to allege an injury fairly traceable to defendants' conduct. Defendants have continued to evaluate their authority to enforce Section 601 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601. Upon further consideration and analysis, defendants have concluded that through other statutory authority they possess residual authority to enforce Section 601.

Section 601 consists of four subsections: subsection (a) is a statement of findings; subsection (b) addresses transportation of air carriers or carriers affiliated with direct air carriers and amends 49 U.S.C. § 41713(b); subsection (c) addresses transportation by motor carriers and amends 49 U.S.C. § 11501; and subsection (d) establishes the effective date of the section. None of these provisions by itself authorizes enforcement of section 601. However, because subsections 601(b) and (c) amend existing statutory provisions in Title 49, they come within general enforcement authority found in the subtitles of Title 49 where the respective subsections are codified.

Sections 46106 and 46107 of Title 49 authorize the Secretary of Transportation and the Attorney General, respectively, to bring civil action to enforce Title 49, Part A of subtitle VII – Aviation Programs, which part includes 49 U.S.C. § 41713, the section amended by subsection 601(b) relating to air carriers. Similarly, 49 U.S.C. § 11703 authorizes the Attorney General to "bring court proceedings to enforce [Subtitle IV – Interstate Commerce]" which subtitle includes 49 U.S.C. § 11501, the statutory provision amended by subsection 601(c) and covering deregulation of motor carriers.

Therefore, defendants recede from their position that plaintiffs lack standing because of a failure to allege an injury fairly traceable to defendants' conduct. Defendants continue to content that plaintiffs lack standing because they have failed to allege an injury that is concrete and imminent. Defendants regret any confusion caused by their previous position in this lawsuit.

Respectfully Submitted,

FRANK W. HUNGER
Assistant Attorney General

W. CHARLES GRACE
United States Attorney

DENNIS C. LINDER
Director, Federal Programs Branch

/s/ Michael Sitcov – by L.P.R.
MICHAEL SITCOV

/s/ Lawrence D. Rosenberg
LAWRENCE D. ROSENBERG
Department of Justice
901 E Street, N.W. – Room 984
Washington, D.C. 20530
Telephone: (202) 514-1944
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 1995 a copy of the forgoing Defendants' Supplemental Statement With Respect to Jurisdiction was sent by Federal Express to:

Edward D. McNamara, Jr.
McNamara & Evans
931 South Fourth Street
P.O. Box 5039
Springfield, IL 62705

/s/ Lawrence D. Rosenberg
Lawrence D. Rosenberg

APPENDIX BB

RICHARD C. LABARTHE
MOCK, SCHWABE, WALDO, ELDER, REEVES & BRYANT
A Professional Corporation
Fifteenth Floor
One Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-5500
Fax: (405) 235-2875

ATTORNEY GENERAL OF MICHIGAN
FRANK J. KELLEY
By his counsel:
FRANK J. KELLEY
Attorney General of Michigan
THOMAS L. CASEY
Michigan Solicitor General
KELLY G. KEENAN
Assistant Deputy Attorney General
The Law Building
Lansing, Michigan 48913
Telephone: (517) 335-1853
Fax: (517) 335-4213

ATTORNEY GENERAL OF KANSAS
CARLA STOVALL
KANSAS CORPORATION COMMISSION
By their counsel:
W. ROBERT ALDERSON
Special Assistant Attorney General
JOHN E. JANDERA
Special Assistant Attorney General
ALDERSON, ALDERSON & MONTGOMERY
2101 S.W. 21st Street
Topeka, Kansas 66604
Telephone: (913) 232-0753
Fax: (913) 232-1866

THE OKLAHOMA CORPORATION COMMISSION
By its counsel:
LAWRENCE R. EDMISON
General Counsel
LESLIE WILSON PEPPER
Deputy General Counsel
JIM THORPE BUILDING
2101 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-2255
Fax: (405) 521-4150

MONTANA PUBLIC SERVICE
COMMISSION
By its counsel:
MARTIN JACOBSON
Special Assistant
Attorney General
State of Montana
1701 Prospect Avenue
P.O. Box 202601
Helena, Montana 59620
Telephone: (406) 444-6178
Fax: (406) 444-7618

THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
By its counsel:
MARC J. FINK
TORBJORN SJOGREN
SHER & BLACKWELL
Suite 612, 2000 L Street, N.W.
Washington, D.C. 20036
Telephone: (202) 463-2500
Fax: (202) 463-4950